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No. 08-

In the Supreme Court of the United States

ROBERT J. LUCAS, JR., *ET AL.*, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PHILLIP A. WITTMANN
DARIA BURGESS DIAZ
Stone Pigman Walther
Wittman LLC
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

STUART ALTSCHULER
LINDA T. COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

GENE C. SCHAERR
Counsel of Record
JOHN FEHRENBACH
LUKE W. GOODRICH
MICHAEL BHARGAVA
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

Counsel for Petitioners

[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TIM C. HOLLEMAN
Boyce Holleman &
Associates
11240 Hwy 49 N.,
Ste. 400-D
Gulfport, MS 39503
(228) 539-6000

W. F. HOLDER II
400 East Railroad St.
Long Beach, MS 39560
228-863-4999

QUESTIONS PRESENTED

1. In applying *Rapanos* v. *United States*, 547 U.S. 715 (2006), to determine federal jurisdiction over wetlands under the Clean Water Act, are federal courts bound to apply the analysis of the plurality decision, the concurrence, or some other standard?

2. Under whichever approach the Court chooses, did the Fifth Circuit err in holding that federal jurisdiction under the Act extends to a wetland that merely "neighbors" a "tributary" of a navigable water, without requiring that the wetland have a *continuous* surface connection with a relatively permanent body of water, or that it *significantly* affect the quality of traditional navigable waters?

3. Is an ordinary residential septic system a "point source" under the Act, and if so, can one who designs or certifies the system but neither owns nor operates it be held criminally liable for its discharges?

PARTIES TO THE PROCEEDINGS

Petitioners Robert J. Lucas, Jr., Robbie Lucas Wrigley, Big Hill Acres, Inc., Consolidated Investments, Inc., and M.E. Thompson, Jr. were defendant-appellants in the court below. Big Hill Acres, Inc. is wholly owned by petitioner Robert J. Lucas, Jr. It has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Consolidated Investments, Inc. is wholly owned by petitioner, Robert J. Lucas, Jr. It has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

The United States Government was the plaintiff-appellee in the court below. There are no other parties.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vi

INTRODUCTION.. 1

OPINIONS BELOW... 2

JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED......... 2

STATEMENT 4

REASONS FOR GRANTING THE PETITION 13

I. Review Is Needed To Resolve A Mature And Acknowledged Circuit Conflict Over the Proper Standard for Determining Jurisdiction Under the Clean Water Act 14

II. Review Is Needed To Overturn The Fifth Circuit's Misinterpretation Of Both The *Rapanos* Plurality And Concurrence, And The Resulting Expansion Of Federal Jurisdiction Over Wetlands..20

III. Review Is Needed To Correct The Fifth Circuit's Erroneous And Expansive Interpretation Of Section 402 Regarding Septic Tanks...26

CONCLUSION.. 34

APPENDIX A 1a

APPENDIX B 64a

APPENDIX C 66a

APPENDIX D 68a

APPENDIX E 70a

APPENDIX F 73a

APPENDIX G 75a

APPENDIX H 130a

APPENDIX I 144a

TABLE OF AUTHORITIES

CASES PAGE(S)

Friends of Sakonnet v. *Dutra*,
738 F. Supp. 623 (D. R.I. 1990) 33

Marks v. *United States*,
430 U.S. 188 (1977) .... passim

Minnesota Center for Environmental Advocacy v. *U.S. Environmental Protection Agency*,
2005 WL 1490331 (D. Minn. 2005) 27

Newton County Wildlife Ass'n v. *Rogers*,
141 F.3d 803 (8th Cir. 1998) 30

Nichols v. *United States*,
511 U.S. 738 (2003) 16

Northern California River Watch v. *City of Healdsburg*,
496 F.3d 993, 999 (9th Cir. 2007) 15

Rapanos v. *United States*,
547 U.S. 715 (2006) .... passim

Sierra Club v. *El Paso Gold Mines, Inc.*,
421 F.3d 1133 (10th Cir. 2005) 31

Solid Waste Agency v. *United States Army Corps of Eng'rs*,
531 U.S. 159 (2001) 5

United States v. *Bass*,
404 U.S. 336 (1971) 29

United States v. *Chevron Pipe Line Co.*,
437 F. Supp. 2d 605 (N.D. Texas 2006)................ 16

United States v. *Gerke Excavating, Inc.*,
464 F.3d 723 (7th Cir. 2006)........................... 14, 15

United States v. *Hagberg*,
207 F.3d 569 (9th Cir. 2000)................................29

United States v. *Johnson*,
467 F.3d 56 (1st Cir. 2006)............................ 15, 16

United States v. *Lanier*,
520 U.S. 259 (1997)..29

United States v. *Needham* (In re Needham),
354 F.3d 340 (5th Cir. 2003)............................... 16

United States v. *Plaza Health Laboratories, Inc.*,
3 F.3d 643 (2d Cir. 1993).......................................29

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985)..5, 6

United States v. *Robison*,
505 F.3d 1208 (11th Cir. 2007)...................... 15, 16

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1)...2

33 U.S.C. § 1311(a)..2, 30

33 U.S.C. § 1319(c) 3

33 U.S.C. § 1342 ....3, 4

33 U.S.C. § 1344(a) 3, 4

33 U.S.C. § 1362(7) 2

33 U.S.C. § 1362(12) 3, 26, 30

33 U.S.C. § 1362(14) 3, 27

33 U.S.C. § 1365(a), (f) 32

40 C.F.R. § 122.1(b)(1)-(2) 3

40 C.F.R. § 122.1(b)(2) 28

40 C.F.R. § 122.2 .... 27, 28

40 C.F.R. § 122.21(a) 30

40 C.F.R. § 122.21(b) 3, 9

54 Fed. Reg. 18,716, 18,718 (1989) 29

OTHER AUTHORITIES

Opening Statement By Chairman James L. Oberstar, House Committee on Transportation and Infrastructure, Hearing on the Clean Water Restoration Act, (Apr. 16, 2008), at 5, http://transportation.house.gov/Media/File/Full%20Committee/20080416/jlo%20open.pdf 18

U.S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (Feb. 2004), at http://www.gao.gov/new.items/d04297.pdf. 17

USEPA, *Decentralized Wastewater Treatment Systems: A Program Strategy* (Jan. 2005) (available at http://www.epa.gov/owm/septic/pubs/septic_program_strategy.pdf) 3

INTRODUCTION

This case gives the Court an opportunity to resolve a serious and acknowledged conflict among the courts of appeals over the proper legal standard governing federal jurisdiction over wetlands. In the wake of this Court's decision in *Rapanos* v. *United States*, 547 U.S. 715 (2006), the federal circuits have split over which opinion controls — the plurality, the concurrence, or either of them. Indeed, in addressing this issue, the circuits have divided on the fundamental question of how and even whether to apply the principles in *Marks* v. *United States*, 430 U.S. 188 (1977), which normally governs the interpretation of fractured decisions. The confusion has led to inconsistent and arbitrary enforcement of the Act and uncertainty over what conduct it prohibits — thereby subjecting landowners nationwide to a vastly increased risk of civil liability and, as in this case, criminal prosecution and incarceration.

This case also provides the Court with an opportunity to correct two sweeping extensions of the Act into areas traditionally regulated by the States. For one thing, the decision below held that, under *Rapanos*, jurisdiction under the Act extends to any wetland that "neighbors" a "tributary" of a traditional navigable waters — even without evidence of a *continuous* surface connection between the wetland and a relatively permanent body of water, as the plurality requires, and even without evidence that the wetland *significantly* affects the quality of traditional navigable waters, as the concurrence requires. Untethered from these critical requirements, the Fifth Circuit's approach would likely extend the Act to virtually all wetlands nationwide.

Also, in direct contravention of the governing regulations and public pronouncements of the Environmental Protection Agency (EPA), the Fifth Circuit interpreted the Act to apply to the discharge of pollutants from ordinary residential septic systems — for the first time subjecting millions of individual homeowners to potential criminal and civil liability for malfunctioning septic systems. Even worse, the court held that the risk of criminal liability extends not only to the owner or operator of a septic system, but to any party who designs, certifies, or installs such a system. The combination of these rulings drastically expands the reach of the Clean Water Act into areas of traditionally state and local control.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 516 F.3d 316 (5th Cir. 2008) and reprinted at Pet. App. 1a-63a. The district court's orders denying the defendants' pre-verdict motions to dismiss are unreported and are reprinted at Pet. App. 66a-74a.

JURISDICTION

The court of appeals entered its judgment on February 1, 2008. Pet. App. 1a-63a. Petitioners timely filed a petition for rehearing en banc on February 15, 2008. The Fifth Circuit treated the petition as a petition for panel rehearing and denied rehearing on March 4, 2008. Pet. App. 64a-65a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. § 1251 *et seq.*, prohibits, except in compliance with specified provisions of the Act, the "discharge of any pollutant" into "navigable waters." 33 U.S.C. § 1311(a). The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

"Discharge of a pollutant" includes "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). "Point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Section 404 of the Act authorizes the Secretary of the Army, acting through the U.S. Army Corps of Engineers, to "issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a).

Section 402 of the Act authorizes the EPA, as well as states with EPA-approved programs, to issue permits for the discharge of pollutants as part of the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342.

EPA has defined the scope of the NPDES permit requirement, 40 C.F.R. § 122.1(b), and has explained which party has the duty to apply for a permit: "When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit." 40 C.F.R. § 122.21(b).

Section 309 of the Act imposes criminal liability on any person who discharges a pollutant without a permit. 33 U.S.C. § 1319(c).

All of these provisions are set out in full in the Appendix.

STATEMENT

Petitioners Robert J. Lucas, Robbie Lucas Wrigley, M.E. Thompson, Jr., Big Hill Acres, Inc., and Consolidated Investments, Inc. were convicted under Sections 402 and 404 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1342 and 1344, for filling wetlands without a permit and for installing single-family residential septic systems without National Pollutant Discharge Elimination System ("NPDES") permits. All petitioners were subjected to multi-million dollar fines, and the individual petitioners were sentenced to, and are now serving, seven to nine years in prison.

1. *This Court's Decision in* Rapanos. Because two of the three questions presented turn on the meaning and effect of the various opinions in *Rapanos*, we begin with a brief summary of that case. The plaintiff in *Rapanos* owned 54 acres of occasionally saturated land located approximately 11 miles away from the nearest navigable water. 547 U.S. at 720. Despite the distance, the U.S. Army Corps of Engineers attempted to exercise jurisdiction over the property on the ground that it constituted "waters of the United States" under the CWA *Ibid.* Affirming the Corps's exercise of jurisdiction, the Sixth Circuit held that "waters of the United States" included wetlands adjacent to non-navigable tributaries of traditional navigable waters. *Id.* at 729-30.

Although this Court reversed, no opinion commanded a majority. A four-Justice plurality defined "waters of the United States" as "only those relatively permanent, standing or continuously flowing bodies of water forming geographic features," such as streams, oceans, rivers, or lakes. *Id.* at 739. According to the plurality, wetlands are subject to CWA jurisdiction only if they are "adjacent" to such waters —

that is, they have a "*continuous surface connection* with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742 (emphasis added). Thus, jurisdiction would not extend to wetlands adjacent to channels "through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Ibid.*

In a concurring opinion, Justice Kennedy interpreted the phrase "waters of the United States" to include any wetlands with a "significant nexus" to navigable waters. *Id.* at 759 (Kennedy, J, concurring) (citing *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001)). Such a nexus may be found "if the wetlands, either alone or in combination with similarly situated lands in the region, *significantly* affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (emphasis added). No nexus exists, however, when the "wetlands' effects on water quality are speculative or insubstantial." *Ibid.*

Four Justices dissented, arguing for a broader view of CWA jurisdiction than either the plurality or the concurrence. *Id.* at 787-88. According to the dissent, CWA jurisdiction should extend to all wetlands "adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" *Id.* (quoting *Riverside Bayview,* 474 U.S. at 131). The dissent indicated it would also uphold jurisdiction "in all other cases in which either the plurality's or Justice Kennedy's test is satisfied." *Id.* at 810.

In a concurring opinion, Chief Justice Roberts lamented the Court's failure to provide lower courts with clearer guidance. As he predicted, in the absence of a majority opinion, "lower courts and regulated entities . . . now have to feel their way on a case-by-case basis." *Id.* at 758.

2. ***The Development at Issue.*** This case began in 1994, when petitioner Robert J. Lucas and the two corporate petitioners began purchasing land from timber companies and selling lots at a development known as Big Hill Acres. The development is located in rural Jackson County, Mississippi approximately eight miles north of the Gulf of Mexico. It is undisputed that there are no navigable waters on or adjacent to the development. Rather, the development drains into non-navigable, intermittent tributaries, ditches, and drainage swales. Pet. App. 116a, 11a-12a. As the district court found, there was "no . . . evidence that any of the water from Big Hill Acres ever really reache[d] a navigable body of water," the closest of which is over two miles away. *Id.* 117a.

Moreover, like most rural areas throughout the United States, this area of Jackson County does not offer central sewer service. Each lot therefore required a separate septic system. Before 1997, Lucas relied exclusively on the Mississippi Department of Health to design and approve Big Hill Acres' septic systems. After designing and approving 200 septic systems, the Department notified Lucas in December 1996 that it was withdrawing 150 of its designs and approvals. Unable to rely any longer on Department designs and approvals, Lucas retained a Mississippi licensed professional engineer, petitioner M.E. Thompson, Jr., to design septic systems on individual lots. Mississippi law allows either the Department or a licensed professional engineer to design residential septic systems.

The septic systems designed by Thompson worked well. The Department confirmed that the rate of septic system malfunction at Big Hill Acres was well below the average septic system failure rate for Jackson County. Trial Transcript ("Tr.") 929-30. While there was some evidence of septic system malfunctions, the Department acknowledged that over half of all septic system failures or malfunctions can be attributed not to design error, but to improper maintenance. *Id.* at 986-87.

No state or local agency ever notified petitioners that any of the septic systems at Big Hill Acres required a state or federal NPDES permit.

3. *Corps and EPA Involvement.* A representative from the U.S. Army Corps of Engineers first inspected Big Hill Acres in 1996 after a large portion of the development had been completed. The August 1996 Corps' report documenting the inspection found no waterway on Big Hill Acres and noted no violation of CWA Section 404. U.S. Army Corps of Engineers Report, Government Exh. 89. It is undisputed that the closest navigable water is over two miles from the development.

Almost three years after the Corps' 1996 inspection, the Corps returned to Big Hill Acres and asked Robert Lucas to delineate all wetlands on the development. In 1999 the Corps' policy was that all wetlands, regardless of their location or proximity to navigable waters, were subject to regulation under the CWA. Lucas complied with the Corps' request and immediately hired a former Corps wetland expert to delineate all wetlands at Big Hill Acres. In June 1999, before the painstaking delineation could be completed, the Corps ordered Lucas to cease and desist from placing dredged or fill material into wetlands without a Section 404 permit. Less than a month later, the EPA, which has concurrent jurisdiction with the Corps under Section 404, issued its own cease and desist order, which was in all material respects identical to the one issued by the Corps.

Both the Corps and the EPA communications addressed only the development and sale of Big Hill Acres wetlands property. The agencies never cited or warned petitioners that the residential septic systems on individual lots also required an NPDES permit under Section 402 of the CWA. Petitioners first learned of the Government's position that the residential septic systems required a permit when the indictment issued.

4. *Trial Court Proceedings.* Petitioners were charged with violating Section 404 of the Act for filling wetlands without a permit, and Section 402 for failing to obtain NPDES permits for residential septic systems installed on individual lots. Petitioners were also charged with mail fraud and conspiracy for selling lots containing wetlands and saturated soils. As the district court recognized, *all* of the charges depended upon a finding that the wetlands at Big Hill Acres were subject to jurisdiction under the CWA. Pet. App. 118a.

The Government's jurisdictional argument turned on the alleged hydrologic connection between those wetlands and navigable waters located several miles away. As the court described it, the government's principal theory was "that ditches and drainage swales, intermittent tributaries and the like are *tributaries* of Section 10 waters and, as such, are protected under the Clean Water Act as they downstream connect with navigable bodies of water." *Id.* at 116a (emphasis added).

Before the trial began, petitioners moved to dismiss the Section 404 counts on grounds of lenity and due process. As petitioners asserted, confusion over the scope of CWA jurisdiction had resulted in division in the lower courts and inconsistent and discriminatory enforcement by federal agencies. The Act therefore gave insufficient notice that petitioners' conduct might be subject to criminal sanctions. However, the district court denied the motion based on an *absence* of clear authority from the Fifth Circuit or this Court. Pet. App. 69a.

Petitioners also moved to dismiss the Section 402 charges, arguing that the Government had failed to charge an offense because NPDES permits are not required for residential septic systems. Petitioners pointed out that (1) neither the CWA nor its regulations define an individual residential septic system as a point source; and (2) the EPA has consistently maintained that individual septic systems (even if they malfunction) are not point sources and thus do not require an NPDES permit. Finally, petitioners showed that, even if an NPDES permit were required, it was not their duty to obtain one because they neither owned, operated, nor controlled the septic systems at issue. See 40 C.F.R. § 122.21(b).

The court denied the motions on the ground that there were disputed issues of fact, including (1) "whether the named Defendants were responsible for or exempt from obtaining permits for discharging pollutants," and (2) "whether pollutants were discharged from a point source directly into wetlands that are waters of the United States." Pet. App. 67a.

At the conclusion of the Government's case, petitioners moved for acquittal on all counts. The court initially granted the petitioners' motion on five of the Section 402 counts, finding insufficient evidence to support the theory that petitioners themselves had discharged a pollutant from the septic systems: "There was *no evidence* that . . . any of these defendants actually added the effluent or pollutant into the ground. . . . This is a serious criminal matter. It's not a civil case. . . . And I think there must be some evidence that meets that essential element of the offense. *And it is not here.*" Pet. App. 119a, 123a (emphasis added). Following a weekend recess, however, the court reversed the judgment of acquittal — not on the ground that its earlier ruling was incorrect, but because it was convinced that a reversal was necessary to preserve the Government's ability to appeal. *Id.* at 127a.

The court reserved its ruling on petitioners' motion for judgment of acquittal on the remaining CWA counts. However, the court specifically noted the paucity of evidence supporting CWA jurisdiction:

> I would be much more impressed with the government's case if there were some evidence . . . some clue as to what might be factors that could be considered in determining whether there is a significant nexus between the wetland and navigable body of water, in fact.
>
> For example, *if there were some evidence* of . . . the flow of water from the wetlands to the navigable body of water. And *we do not have that here.* Some evidence that there is contamination at the Section 10 navigable body of water which is adjacent to the wetland[,] . . . [or] some evidence which tends to show that there will be future contamination or a danger of contamination. And *we don't have any of that here.*

Id. at 116a-117a (emphasis added).

The jury nevertheless returned a verdict of guilty on all counts. The Court sentenced Robert Lucas to a total of 108 months incarceration, 3 years supervised release, $1,407,400 restitution, a $15,000 fine, and a

$4,100 special assessment. Robbie Lucas Wrigley, his daughter, and M.E. Thompson, Jr., each received a sentence of 87 months incarceration, 3 years supervised release, $1,407,000 restitution, a $15,000 fine, and a $3,300 special assessment.[1]

5. *The Fifth Circuit's Extension of CWA Jurisdiction Under A Misapplication Of The* Rapanos *Plurality And Concurrence.* On appeal, petitioners argued that their convictions should be overturned because they were based on a legally insupportable interpretation of jurisdiction under the CWA. Specifically, petitioners maintained that, under the various approaches to jurisdiction in *Rapanos*, the Government had failed to establish the requisite connection between the wetlands on Big Hill Acres and "waters of the United States."

Adopting a sweeping interpretation of CWA jurisdiction, the Fifth Circuit rejected petitioners' argument. The court instead interpreted *Rapanos* to extend CWA jurisdiction to "waters" — including "wetlands" — that merely "*neighbor* tributaries of navigable waters." Pet. App. 11a & n. 18 (emphasis added). According to the court, this is proper under the *Rapanos* plurality opinion "because the plurality definition includes wetlands adjacent to 'a relatively permanent body of water connected to traditional interstate navigable waters.'" *Id.* (citation omitted; emphasis in original). Based on evidence that water flowed from the wetlands at Big Hill Acres through *intermittent* drains, eventually reaching tributaries of navigable waters, the court held that the wetlands were subject to CWA jurisdiction. *Id.* at 11a-12a. However, the court cited no evidence, as required under the *Rapanos* plurality, establishing a "*continuous* surface connection" between the wetland and a "relatively *permanent* body of water." 547 U.S. at 742 (emphasis added).

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[1] In addition, Big Hill Acres, Inc. received a sentence of 5 years probation, a $4,800,000 fine, restitution of $1,407,400, and a special assessment of $7,600, while Consolidated Investments, Inc. received 5 years probation, a $500,000 fine, $1,407,400 restitution, and a special assessment of $400.

The court also purported to apply the "significant nexus" standard of the *Rapanos* concurrence. According to the court, that standard was satisfied merely by "evidence that the [Big Hill Acres] wetlands control flooding in the area and prevent pollution in downstream navigable waters." Pet. App. 12a. The court, however, cited no evidence of the magnitude of any effect on downstream waters, much less evidence that such effects were "significant." *Ibid.*; *Rapanos*, 547 U.S. at 780. The court thus rejected petitioners' jurisdictional challenge.

Petitioners also challenged their convictions on the ground that the faulty septic systems were not "point sources" under the CWA and therefore not subject to NPDES permitting requirements. Moreover, Petitioners argued that, even if a septic system were a "point source," petitioners were not required to obtain a permit because they neither owned nor operated the faulty septic systems. The Fifth Circuit, however, concluded that septic systems *are* a "point source" simply because they are "containers," and the definition of "point source" includes "any . . . container . . . from which pollutants are or may be discharged." Pet. App. 24a. The court did not, however, address the contrary position and public statements of the EPA, which has consistently maintained that a residential septic system is *not* a point source.

Finally, the Court held that, even though the petitioners were not "operators" of the septic systems, they were criminally liable because, simply by designing and certifying the systems, they "caused" the septic systems' owners to discharge pollutants in violation of the CWA. *Id.* at 31a.

REASONS FOR GRANTING THE PETITION

Since this Court's three-way split in *Rapanos* v. *United States*, 547 U.S. 715 (2006), the federal courts of appeals have expressly divided over which of the opinions controls and, thus, what legal standard governs jurisdiction under the Clean Water Act. Indeed, they have divided on the more fundamental issue of how, and even whether, to apply the interpretive principles in *Marks* v. *United States*, 430 U.S. 188 (1977). The confusion has led to inconsistent enforcement of the CWA — including (as in this case) criminal enforcement — and enormous uncertainty for landowners nationwide.

Perhaps as a result of the confusion, the Fifth Circuit now appears to have extended jurisdiction under the CWA as far as it has ever reached before — encompassing not only wetlands adjacent to navigable waters, but wetlands "neighboring" mere tributaries of traditional navigable waters, even where there is no demonstrably continuous surface connection with any relatively permanent body of water, and no significant effect on the quality of traditional navigable waters. The court has also held that the CWA permitting requirements extend to ordinary residential septic systems and to virtually any individual who designs, certifies, or installs a faulty septic system. The combination of these rulings drastically expands federal control over traditionally state and local land-use decisions.

This case thus presents the Court with another opportunity to resolve a far-reaching issue of statutory interpretation on which this Court divided in *Rapanos* and on which the lower courts are now more divided than ever, and to curb further unnecessary and unauthorized expansion of federal power at the expense of state and local governments.

I. Review Is Needed To Resolve A Mature And Acknowledged Circuit Conflict Over the Proper Standard for Determining Jurisdiction Under the Clean Water Act.

There can be no serious doubt that the first question presented is worthy of this Court's review. As this Court is well aware, the touchstone of federal jurisdiction under the CWA — "waters of the United States" — is both extraordinarily important and notoriously difficult to define. And the courts of appeals are in acknowledged conflict over *which* of the opinions in *Rapanos* controls. The Seventh, Ninth, and Eleventh Circuits have concluded that Justice Kennedy's "significant nexus" approach controls. The First Circuit, by contrast, has allowed jurisdiction when *either* the plurality or the concurrence is satisfied — effectively aligning itself in important respects with the *Rapanos* dissent.

1. In *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), the Seventh Circuit applied Justice Kennedy's approach. There, the defendant had discharged pollutants into a 6-acre tract of wetlands, which drained via a ditch into a small tributary of a non-navigable river, which then emptied into the Wisconsin River, a navigable body of water. See *id.* at 805.

Given the absence of any majority opinion in *Rapanos*, the court applied *Marks* v. *United States*, asking which *Rapanos* opinion "concurred in the judgments on the narrowest grounds." 430 U.S. at 193.

According to the Seventh Circuit, because Justice Kennedy's concurrence was less restrictive of the *government's* jurisdiction under the CWA, it constituted the "narrowest ground." 464 F.3d at 724-25. The court also noted that whenever Justice Kennedy would find jurisdiction on the basis of a "significant nexus," the four dissenters would find jurisdiction as well. *Id.* at 724. The Ninth Circuit reached the same conclusion in *Northern California River Watch* v. *City of Healdsburg*, holding without analysis that Justice Kennedy's concurrence "is the narrowest ground to which a majority of the Justices would assent if forced to choose." 496 F.3d 993, 999 (9th Cir. 2007).

Noting that "[t]he circuits . . . are split on the question of which *Rapanos* opinion provides the holding," the Eleventh Circuit joined the Seventh and Ninth Circuits in concluding that Justice Kennedy's opinion was controlling. *United States* v. *Robison*, 505 F.3d 1208, 1219 (11th Cir. 2007). According to the Eleventh Circuit, Justice Kennedy's concurrence was narrower because it was less "restrictive of CWA jurisdiction." *Id.* at 1221.

The First Circuit, by contrast, has concluded that CWA jurisdiction could be established under *either* the concurring or the plurality opinions in *Rapanos*. *United States* v. *Johnson*, 467 F.3d 56, 61 (1st Cir. 2006). In so concluding, the First Circuit criticized the Seventh Circuit for "equat[ing] the 'narrowest opinion' with the one least restrictive of federal authority to regulate." *Ibid.* By allowing a showing of jurisdiction under either test, however, the First Circuit essentially aligned itself with the dissent in *Rapanos*, which would also find jurisdiction under either test. *Rapanos*, 547 U.S. at 810.

Although the First Circuit acknowledged that it thus deviated from the Court's guidance in *Marks*, it asserted that "the Supreme Court itself has moved away from the *Marks* formula." 467 F.3d at 65 (citing *Nichols* v. *United States*, 511 U.S. 738, 745-46 (2003)). The Eleventh Circuit's opinion in *Robison* however, specifically criticized the First Circuit for departing from *Marks*. 505 F.3d at 1221.[2]

2. *Rapanos* has not only divided the circuit courts, but has also exacerbated the already significant regulatory uncertainty over CWA jurisdiction. Even before *Rapanos*, the GAO highlighted drastic inconsistencies in how the Corps exercised jurisdiction over wetlands — including inconsistencies within individual district offices. U.S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Repre-

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[2] District courts, similarly, have had great difficulty in applying *Rapanos*. The Northern District of Texas, for example, rejected *Rapanos* entirely. *United States* v. *Chevron Pipe Line Co.*, 437 F. Supp. 2d 605 (N.D. Tex. 2006). It did not consider itself bound by the plurality; and it criticized Justice Kennedy's "significant nexus" test as a "vague, subjective centerpiece." *Ibid.* The court therefore "look[ed] to the prior reasoning in [the Fifth] [C]ircuit," concluding that "the proper inquiry is whether . . . the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at 614 (citing *In re Needham*, 354 F.3d 340, 346 (5th Cir.2003)).

One district judge in Alabama was so "perplexed" by the post-*Rapanos* state of the law that he removed himself from a case entirely rather than attempting to apply *Rapanos*. *United States* v. *Robison*, 521 F. Supp. 2d 1247, 1248 (N.D. Ala. 2007). On remand from the Eleventh Circuit's decision in *Robison*, the judge explained that "I am so perplexed by the way the law applicable to this case has developed that it would be inappropriate for me to try it again." *Ibid.* He also noted the anomaly of the Eleventh Circuit's decision, namely, that "a test which serves to broaden federal jurisdiction ('i.e., less restrictive of CWA jurisdiction') is the 'less far reaching' and 'narrowest' of two purported tests." *Ibid.*

sentatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO-04-297 (Feb. 2004), at http://www.gao.gov/new.items/d04297.pdf.

Since *Rapanos*, the problems have only grown worse. In its wake, the EPA and the Corps have been unable to promulgate final regulations clarifying the extent of jurisdiction over wetlands; instead, they have issued joint guidance incorporating elements of both the plurality and the concurrence. Even that guidance, however, has been roundly criticized as creating further ambiguity and uncertainty, so much so that one Congressional Committee recently lamented that *Rapanos* has created a "regulatory nightmare":

> [T]here is a consensus that, despite the best intentions of [EPA] and the Corps . . . , the *SWANCC* and *Rapanos* decisions and the implementation guidance have been a failure. . . . [T]he regulatory nightmare created by the Supreme Court cannot be fixed by any subsequent administrative actions. The lack of a clear, definitive standard on the *Rapanos* decisions would mean that any subsequent agency action would further build on this judicial "house of cards."

Opening Statement By Chairman James L. Oberstar, House Committee on Transportation and Infrastructure, Hearing on the Clean Water Restoration Act, (Apr. 16, 2008), at 5, http://transportation.house.gov/Media/File/Full%20Committee/20080416/jlo%20open.pdf.

The lengthy delays and high costs of the CWA permitting process — detailed by the plurality in *Rapanos* — have also grown. See 547 U.S. at 721. Because agency guidance requires a case-by-case analysis of whether a particular wetland has a "significant nexus" to navigable waters, "there has been a significant slowdown in the processing of permits by the Corps — estimated by the Corps to be as much as 60 to 90 additional days per permit application." Memorandum from the Subcommittee on Water Resources and Environment Majority Staff to Members of the Committee on Transportation and Infrastructure, at 7 (Apr. 11, 2008), at http://transportation.house.gov/Media/File/Full%20Committee/20080416/SSM_WR_04-16-08.pdf. State and local public works agencies have likewise reported "significant delays and cost increases" following *Rapanos*; one State reported that the time required for Section 404 permitting has increased from 120 days to over eight months. *Ibid.*

3. In this case, the Fifth Circuit attempted to sidestep the disagreement within this Court and the resulting circuit conflict by determining that the evidence was sufficient to support CWA jurisdiction — and thus petitioners' convictions — under *both* the *Rapanos* plurality and concurrence. See Pet. App. 11a-13a. However, as noted earlier, that approach required the Fifth Circuit to conclude that *Rapanos* extends federal jurisdiction under the CWA not only to wetlands that are themselves connected to "navigable-in-fact" waters, but also to wetlands that "neighbor" *tributaries* of those waters — even absent a continuous surface connection between the wetland and a relatively permanent body of water, and absent evidence that the wetland has a *significant* effect on traditional navigable waters. As we will explain, that holding is flatly inconsistent with both the *Rapanos* plurality and Justice Kennedy's concurrence, and it independently warrants this Court's review.

In short, the conflict about how courts should apply *Rapanos* is clear, and this case, although it may not widen the conflict, provides an excellent vehicle for resolving it — as well as the underlying confusion over the vitality and proper application of *Marks*. Before reaching the second question presented here, the Court would logically need to decide which of the *Rapanos* opinions, if any, controls the analysis of CWA jurisdiction in general and therefore controls the resolution of the second question presented. If the Court then determined, as the First Circuit has done (without applying *Marks*), that the *Rapanos* plurality provides a *sufficient* basis for determining jurisdiction under the CWA, the Court would next need to decide (in addressing the second question) whether the Fifth Circuit correctly interpreted the plurality opinion. And if the Court agreed with that interpretation, the convictions (at least under Section 404) would be sustained, whereas if the Court disagreed, further analysis would be required.

On the other hand, if the Court determined that the *Rapanos* concurrence *alone* controls the jurisdictional issue, as the Seventh, Ninth and Eleventh Circuits have held, the Court would need to determine whether the Fifth Circuit's "neighboring wetland" analysis — the subject of the second question — comports with the *Rapanos* concurring opinion. And if so, the convictions (at least under Section 404) would be sustained, whereas if not, further analysis would likewise be required.

Either way, this case will allow the Court to resolve the existing circuit split as well as the underlying confusion over the proper interpretation of a fractured decision of this Court. And it will allow the Court to do so in the context of an indisputably final order, and in a case directly implicating not only money and property, but liberty.

II. Review Is Needed To Overturn The Fifth Circuit's Misinterpretation Of Both The *Rapanos* Plurality And Concurrence, And The Resulting Expansion Of Federal Jurisdiction Over Wetlands.

The Fifth Circuit's holding that *Rapanos* extends federal jurisdiction under the CWA to wetlands that merely "neighbor" "tributaries" of navigable waters, without requiring evidence of a continuous surface connection with a relatively permanent body of water, or a significant effect on the water quality of navigable waters, independently warrants this Court's review. Indeed, that holding flatly misinterprets *both* the *Rapanos* plurality and the concurrence.

1. The *Rapanos* concurrence requires not just a hydrologic connection between wetlands and a "neighbor[ing] tributar[y]" eventually reaching navigable water (Pet. App. 11a n.18); it requires a "significant nexus" between the wetland and navigable water — specifically, evidence that "the wetlands, either alone or in combination with similarly situated lands in the region, *significantly affect* the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 547 U.S. at 780 (emphasis added). Wetlands that have merely a "speculative or insubstantial" effect on the quality of navigable waters are not covered. *Ibid.*

On this point, the Fifth Circuit's analysis consisted of a single sentence: "The Government presented evidence that the [Big Hill Acres] wetlands control flooding in the area and prevent pollution in downstream navigable waters, evidence supporting the significant nexus standard of the *Rapanos* concurrence." Pet. App. 12a. The cited "evidence," however, consisted entirely of speculation, as the district court itself pointed out: "I would be much more impressed with the government's case . . . if there were some evidence of . . . the flow of water from the wetlands to the navigable body of water. And *we do not have that here.* Some evidence that there is contamination at the Section 10 navigable body of water[,] . . . [or] some evidence which tends to show that there will be future contamination or a danger of contamination. And *we don't have any of that here.* Pet. App. 117a (emphasis added). In fact, the district court emphasized that there was "no hard evidence of contamination of a navigable body of water," and "no hard evidence . . . that any of the water from Big Hill Acres ever really reaches a navigable body of water" at all. *Ibid.* The Fifth Circuit's opinion nowhere disputes the district court's characterization of the evidence.

If, as the Fifth Circuit has now held, conclusory statements that wetlands "control flooding" and "prevent pollution" are sufficient to establish a "significant nexus," then virtually all wetlands are subject to the CWA — for *all* wetlands arguably control flooding and prevent pollution to some extent. Such a result, however, is contrary to Justice Kennedy's admonition that effects on water quality cannot be merely "speculative or insubstantial." 547 U.S. at 780.[3]

2. The Fifth Circuit's decision also misinterprets the *Rapanos* plurality, which held that wetlands are subject to CWA jurisdiction only if they are (1) "adja-

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[3] The problem is highlighted by the answer of an EPA witness to a question by the trial judge whether, "[i]f one drop of water gets from Big Hill Acres to the Pascagoula River, then however that drop gets there would be a tributary?" The witness responded, "I think that's a reasonable description of the word tributary." Tr. 2124. But as Justice Kennedy explained, such an expansive definition would sweep in any "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it." *Rapanos,* 547 U.S. at 781.

cent" to (2) a "relatively permanent, standing or flowing body of water." Wetlands are "adjacent" if they have a "*continuous* surface connection" with neighboring water, "making it difficult to determine where the 'water' ends and the 'wetland' begins." 547 U.S. at 742 (emphasis added). A body of water is "relatively permanent" if it is a "continuously present, fixed bod[y] of water," such as a stream, ocean, river, or lake. *Id.* at 733. Jurisdiction does not extend to wetlands adjacent to "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Ibid.*

In the decision below, the Fifth Circuit interpreted this analysis to extend to "wetlands that neighbor tributaries of navigable waters," whether or not they are themselves navigable in fact. Pet. App. 11a n. 18. And the court reached that conclusion "because the plurality definition includes wetlands adjacent to 'a relatively permanent body of water *connected to* traditional interstate navigable waters.'" *Ibid.* (citation omitted; emphasis in original).

But the panel's interpretation of the *Rapanos* plurality is incorrect. That opinion did not say that jurisdiction under the CWA extends to any body of water that is "adjacent" to a body of water that is in turn "connected" to "traditional interstate navigable water." If such an attenuated connection were sufficient to establish CWA jurisdiction, virtually all wetlands would be covered. See *Rapanos*, 547 U.S. at 722 (noting that "the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls").

Instead, the *Rapanos* plurality opined that wetlands are subject to CWA jurisdiction only if they are "adjacent" to a "relatively permanent" body of water (such as a stream, ocean, river, or lake), defining "adjacency" as a "continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742. Thus, contrary to the decision below, "adjacency" to tributaries "connected" to navigable waters is not enough. There must also be a "*continuous* surface connection" between the wetland *and* a "*relatively permanent*" body of water.

Here, the Fifth Circuit cited no evidence of a "relatively permanent" body of water bordering the wetlands on Big Hill Acres. As noted, the property lies about eight miles north of the Gulf of Mexico in Mississippi and about two-and-a-half miles from the nearest navigable waters. The only connection between these waters and the wetlands on Big Hill Acres is a series of *intermittent* drains. Pet. App. 116a-117a. As Dr. Sanders, the defense expert, testified, "All of the drains departing Big Hill Acres are intermittent streams." Tr. 4156.

Although the Fifth Circuit relied on evidence of "flowing open water" north of Big Hill Acres, as well as tributaries on the western portion of the property with "strong flow" and "high velocity," Pet. App. 11a, there was no evidence (and the Fifth Circuit cited none) that these tributaries were "relatively permanent." In fact, one of the government's two witnesses on jurisdiction (Stokley) testified that his analysis "didn't differentiate" between "perennial or intermittent" streams; the other (Wylie) admitted that he used the term "tributary" to refer to "intermittent drains" and that key tributaries leading away from Big Hill Acres were, in fact, "intermittent drains." Tr. 2238 (Stokley); *id.* at 3133-34 (Wylie). Moreover, Mr. Wylie agreed that, according to U.S. Geological Survey maps, "there's not a single stream or drain way on Big Hill Acres that . . . is anything other than an intermittent stream." *Id.* at 3110.

The Fifth Circuit also cited "maps of Big Hill Acres . . . show[ing] Fort Bayou Creek, Bayou Costophia [sic], tributaries to Bayou Catophia [sic], and tributaries to Little Bluff Creek all *connected to* the development property, and all *eventually flowing* into [navigable waters]." Pet. App. 12a (emphasis added). But again, the fact that wetlands are "connected to" tributaries that "eventually flow[]" into navigable waters is irrelevant. The *Rapanos* plurality requires significantly more — namely a "continuous surface connection" to "relatively permanent" bodies of water, not just any "tributary" that might "eventually flow" into navigable waters.

The court also pointed to testimony that "there is a continuous band of wetlands and streams and creeks that lead from the site to the waters," as well as "drainage and wetlands patterns that 'branch up towards the site.'" Pet. App. 12a. But here again, there was no evidence that these "streams and creeks" were "relatively permanent."[4] And even if they were, the Fifth Circuit cited no evidence that the wetlands at Big Hill Acres have a "continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos*, 547 U.S. at 742. Instead, the Fifth Circuit found the plurality's standard satisfied primarily on the ground that some drainage from the development, at some times, "eventually" flowed into a navigable water. Pet. App. 12a.

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[4] As the district court described it, "the government's evidence in this case . . . is in large part — what I'll refer to as a *hydrological* connection between Big Hill Acres wetlands and Section 10 waters downstream." Pet. App. 116a. But under the plurality's standard, wetlands with a "physically remote hydrologic connection to 'waters of the United States' *lack* the necessary connection to covered waters" required for jurisdiction. *Id.* at 2226 (emphasis added).

Finally, the Fifth Circuit referred to a photograph of an EPA witness in a kayak in a drainage swale *after a hard rain* and held that "[a] jury could have reasonably concluded that these pictures show areas on the edge of the [Big Hill Acres] property where 'it is difficult to determine where the water ends and the wetland begins.'" *Id.* at 11a-12a (quoting *Rapanos*, 547 U.S. at 742). There was no evidence, however, that this isolated incident established a "continuous" surface connection between the drainage swale and the wetlands. In fact, there was no evidence of the surface connection between the wetlands and the drainage swale at all — let alone testimony that the picture of a kayaker established such a connection. The Fifth Circuit therefore incorrectly found jurisdiction under the *Rapanos* plurality, and did so because it failed to require either a "relatively permanent" body of water, or a "continuous surface connection" between the wetlands at issue and such a body.

In short, the Fifth Circuit has now effectively held that federal jurisdiction under the CWA extends to all "wetlands that neighbor tributaries of navigable waters" *regardless* of whether there is a continuous surface connection and *regardless* of whether the wetland has a significant impact on the water quality of traditional navigable waters. The decision below thus represents a breathtaking expansion of federal power in this area — an expansion that is plainly at odds with both the plurality and the concurrence. Moreover, that expansion can be corrected in this case even if the Court is unable to reach a definitive resolution of the first question presented.

III. Review Is Needed To Correct The Fifth Circuit's Erroneous And Expansive Interpretation Of Section 402 Regarding Septic Systems.

This case also provides the Court an opportunity to correct the Fifth Circuit's sweeping extension of the CWA into another area traditionally regulated by the States — septic systems. The court below interpreted the term "point source" to include, for the first time, an ordinary residential septic system — just like the septic systems that serve nearly 25% of all U.S. households and almost 33% of all new development. U.S. Environmental Protection Agency, *Decentralized Wastewater Treatment Systems: A Program Strategy* ("EPA Program Strategy") at 2 (EPA 832-R-05-002) (Jan. 2005), at http://www.epa.gov/owm/septic/pubs/septic_program_strategy.pdf (citing U.S. Department of Commerce, U.S. Census Bureau, *American Housing Survey for the United States — 1995*, issued September 1997). The court also concluded that criminal liability for the "discharge of any pollutant" from a leaky septic system extends not only to the owner or operator of the system, but to any party who, merely by designing, certifying, *or* installing a faulty septic system, "causes" a homeowner to discharge a pollutant. These rulings are not merely wrong; they drastically shift the traditional federal-state balance of authority over local land and water use.

1. Under the CWA, NPDES permits are required only for the discharge of a pollutant from a "point source." 33 U.S.C. § 1362(12). "Point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which

pollutants are or may be discharged." 33 U.S.C. § 1362(14). Although the Fifth Circuit acknowledged that a septic system "is typically a diffuse, ***non-point*** source," it held that "install[ing] septic systems directly in wetlands . . . ma[de] a system that is typically a diffuse, non-point source into a point source." Pet. App. 23a-24a n.43 (emphasis added). Other than the Fifth Circuit's opinion here, we are aware of no case that has ever held an ordinary septic system to be a point source.[5]

That is likely because the Fifth Circuit's decision conflicts with EPA's own consistent position that an individual septic system is *not* a point source. For example, in a 2005 proceeding that overlapped with the prosecution at issue here, EPA maintained that "[i]t is contrary to EPA guidance to treat failing septic systems as point sources." Defendants' Memorandum in Response to Plaintiffs' Motion for Summary Judgment, 2005 WL 1585031 (May 19, 2005), in *Minnesota Center for Environmental Advocacy* v. *U.S. Environmental Protection Agency*, 2005 WL 1490331 (D.

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[5] The Fifth Circuit relied on three district court opinions, none of which involved individual septic systems like those at issue here. 516 F.3d at 333-34. Two of the three cases involved what the court called a "straight pipe septic system." *Id.* Such a system, however, is not a septic system at all—it is simply a pipe that disposes "untreated sewage directly . . . [in]to rivers, lakes, drain tiles or ditches." *Id.*; *see United States* v. *Evans*, 2006 WL 2221629, at *27 (M.D. Fla. July 14, 2006) (sewage was bypassing septic system and flowing directly into a creek); *Minnesota Center for Environmental Advocacy* v. *EPA*, 2005 WL 1490331, at *6 (D. Minn. June 23, 2005) ("straight pipe septic system"). The third case involved a "[p]rivately owned treatment works" treating sewage from 33 homes; but the definition of a "treatment works treating domestic sewage" expressly *excludes* "septic tanks or similar devices." 40 C.F.R. § 122.2.

Minn. 2005).[6] Similarly, EPA's overview of the NPDES permitting program explains that "[i]ndividual homes that are connected to a municipal system, *use a septic system*, or do not have a surface discharge *do not need an NPDES permit*."[7] The fact that EPA has never regulated individual residential septic systems, let alone put the public on notice that such systems are subject to NPDES permitting requirements, confirms that individual septic systems are not a point source.

The Fifth Circuit's interpretation also conflicts with regulations governing the NPDES permitting program. Although those regulations require permits for "owners or operators of any treatment works treating domestic sewage," 40 C.F.R. § 122.1(b)(2), they specifically *exclude* from the definition of "treatment works treating domestic sewage" any "septic tanks or similar devices." 40 C.F.R. § 122.2. As the Ninth Circuit has explained, this indicates that the CWA was not intended to sweep septic systems within the NPDES permitting program:

> The EPA's decision to exclude septic tanks from the definition of "treatment works treating domestic sewage" under the permit program implements its belief that Congress did not intend that all private owners of septic tanks would be required to acquire a [NPDES] permit to operate the septic tanks.

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[6] Although EPA made this assertion with respect to the determination of "total maximum daily loads" (TMDLs) for particular pollutants and waters in a State, the definition of "point source" is the same for TMDLs as it is for the NPDES permitting program.

[7] Available at http://www.epa.gov/enforcement/monitoring/programs/cwa/npdes.html (emphasis added).

United States v. *Hagberg*, 207 F.3d 569, 574 (9th Cir. 2000) (emphasis added). In fact, as EPA's own commentary to the NPDES permit regulations explains, given the fact that Congress expressly regulated septage treatment and processing but not septage generation, "*it would serve no useful purpose to require [NPDES] permits for the 22 million homeowners with septic tanks.*" National Pollutant Discharge Elimination System Sewage Sludge Permit Regulations; State Sludge Management Program Requirements, 54 Fed. Reg. 18,716, 18,718 (1989) (emphasis added).

2. The Fifth Circuit's novel ruling is all the more problematic because it comes not in the context of a regulatory proceeding, but in a criminal prosecution. This Court has long held that, in the criminal context, the rule of lenity requires that any statutory ambiguity be "resolved in favor of the defendant." *United States* v. *Bass*, 404 U.S. 336, 348 (1971), so as to ensure that citizens have "fair warning" that the challenged conduct is criminal. *United States* v. *Lanier*, 520 U.S. 259, 266-67 (1997). As this Court has explained, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* at 266; see also *United States* v. *Plaza Health Laboratories, Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (applying the rule of lenity to the definition of "point source").

Here, however, neither the CWA nor prior case law would put any defendant on notice that a septic system is a point source. Indeed, as explained above, EPA has consistently maintained the *opposite* position. Moreover, there are no federal regulations applicable to individual, residential septic systems; no federal guidelines explain how to apply the NPDES permit program to such septic systems; and, to our knowledge, EPA has never issued an NPDES permit for an individual, residential septic system. The defendants thus face nearly a decade in federal prison, largely for conduct that may never have been criminalized before.

Nor are the drastic implications of the Fifth Circuit's opinion confined to the narrow issue of septic systems. In concluding that the defendants were criminally liable for failing to obtain an NPDES permit, the court adopted a novel theory of "indirect[] liab[ility]," according to which the defendants could be held criminally liable for the "discharge of [a] pollutant" even though they neither owned, operated, nor controlled the offending point source. Pet. App. 31a, 34a. According to the court, the defendants were liable because "they aided and abetted the operation of the septic systems" and therefore "caused" the resulting discharges. *Id.* at 34a.

But nothing in the text of the CWA, its implementing regulations, or precedent support this novel theory. The CWA prohibits the "discharge of any pollutant" into navigable waters without a permit, 33 U.S.C. § 1311(a), while "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (emphasis added). As a textual matter, then, the defendants could not "add" any pollutant from a point source because they did not use, own, or control the alleged point source. And even assuming the defendants could "add" a pollutant from a point source they never used, that conduct was unlawful only because the defendants lacked an NPDES permit. But NPDES permits are available only for the owner or operator of a point source. See 40 C.F.R. § 122.21(a), (b); *Newton County Wildlife Ass'n* v. *Rogers*, 141 F.3d 803, 810 (8th Cir. 1998); *Sierra Club*

v. *El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1143 (10th Cir. 2005).

Here, it is undisputed that the defendants neither owned nor operated the alleged point source. The Fifth Circuit's novel theory of indirect liability thus holds them criminally liable for a permit they neither should nor could have obtained.

3. The Fifth Circuit's decision also fundamentally alters the balance of state and federal authority over local land and water use. The regulation of septic systems has always been a matter of exclusively state and local control. Rather than promulgating regulations applicable to septic systems, EPA has issued "*Voluntary* National Guidelines for Management of Onsite and Clustered (Decentralized) Wastewater Treatment Systems," guidelines that are designed to help "rais[e] the quality of ***state, tribal, and local management***" of septic systems. (available at http://www.epa.gov/owm/septic/pubs/septic_guidelines.pdf) (emphasis added). Moreover, EPA's "Program Strategy" for dealing with septic systems lists as a "Guiding Principle" that "States, Tribes and some local governments are responsible for regulating and managing [septic] systems." USEPA, *Decentralized Wastewater Treatment Systems: A Program Strategy* (Jan. 2005) (available at http://www.epa.gov/owm/septic/pubs/septic_program_strategy.pdf). The Fifth Circuit's septic system ruling, however, injects EPA squarely into the realm of traditionally state and local decision making.

Rapanos counseled against precisely this result. There, the Court explained that if the phrase "waters of the United States" were ambiguous as applied to intermittent flows, "our own canons of construction would establish that the Corps' interpretation of the statute is impermissible" because it would "result in a significant impingement of the States' traditional and primary power over land and water use." 547 U.S. at 737-738 (quoting *SWANCC*, 531 U.S. at 174). In rejecting the Corps' interpretation as overly broad, the Court emphasized that "[r]egulation of land use, as through the issuance of the development permits [in CWA cases], is a quintessential state and local power," and that a key purpose of the CWA is to preserve "primary state responsibility for ordinary land-use decisions." *Id.* at 738, 755-56.

The Fifth Circuit's opinion, however, does just the opposite: It extends federal authority over individual septic systems, which have always been the responsibility of state and local authorities. Any ambiguity in the definition of point source should have been resolved in favor of state and local control.

Finally, it is difficult to overstate the immense practical significance of the Fifth Circuit's decision. According to the U.S. Census Bureau, septic systems serve nearly 25% of U.S. households and almost 33% of new development. EPA Program Strategy at 2. It is estimated that 10% to 20% of these systems are already malfunctioning as a result of inadequate management, and over half are over 30 years old and at high risk of failure. *Ibid.* Thus, under the Fifth Circuit's ruling, millions of homeowners may be required to obtain NPDES permits for their septic systems and face criminal liability if they fail to do so.

Although agency and prosecutorial discretion may reduce the risk of prosecution in many cases, the same is not true of citizen suits. Section 505 of the CWA authorizes "any citizen" to commence a civil action against "any person" who has allegedly discharged a pollutant from a point source without an NPDES permit. 33 U.S.C. § 1365(a), (f). The Fifth Circuit's ruling thus opens the door to suits for injunctive relief, civil penalties, and attorneys' fees against tens of millions of ordinary homeowners, not to mention developers and engineers, for allowing a discharge without an NPDES permit. See *Friends of Sakonnet* v. *Dutra*, 738 F. Supp. 623 (D. R.I. 1990) (citizen suit for failed sewage system). In short, one neighbor can now hale another into federal court simply for failing to maintain his septic system. That is not and cannot be the law.

CONCLUSION

The petition should be granted.

Respectfully submitted.

PHILLIP A. WITTMANN
DARIA BURGESS DIAZ
Stone Pigman Walther
Wittman LLC
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

STUART ALTSCHULER
LINDA T. COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600

TIM C. HOLLEMAN
Boyce Holleman &
Associates
11240 Hwy 49 N.,
Ste. 400-D
Gulfport, MS 39503
(228) 539-6000

GENE C. SCHAERR
Counsel of Record
JOHN FEHRENBACH
LUKE W. GOODRICH
MICHAEL BHARGAVA
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

W. F. HOLDER II
400 East Railroad St.
Long Beach, MS 39560
228-863-4999

Counsel for Petitioners

JUNE 2008

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-60289

UNITED STATES OF AMERICA,	)	
	)	Plaintiff-Appellee
v.	)	
	)	
ROBERT J. LUCAS, JR.; BIG HILL ACRES INC.; CONSOLIDATED INVESTMENTS INC.; ROBBIE LUCAS WRIGLEY; M. E. THOMPSON JR.,	)	
	)	Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Mississippi

Before HIGGINBOTHAM, SMITH, and OWEN, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge.

I

Defendants sold house lots and designed and certified septic systems on wetlands but represented the lots as dry. Septic systems on the lots failed, causing waste discharges. The Government charged the corporate developer and various individuals with Clean Water Act (CWA) violations, mail fraud, and conspiracy to commit mail fraud and to violate the CWA. A jury found Defendants guilty on all counts.[1] Defendants appealed.

II

Robert J. Lucas owned Big Hill Acres, Inc. (BHA, Inc.) and Consolidated Investments, Inc. Through these companies, he acquired Big Hill Acres (BHA), a large parcel of land in Jackson County, Mississippi approximately eight miles from the Gulf of Mexico. He subdivided the property and sold mobile home lots under long-term installment plans. The property was not connected to a central municipal waste system, and County law required Lucas to certify and install individual septic systems on each lot before they could establish electric hook-ups or sell the lots. In Jackson County, septic systems must be approved by an engineer with the Mississippi Department of Health (MDH) or by an independent licensed engineer. Lucas initially hired an MDH engineer to approve septic systems, but MDH withdrew many of its initial approvals when it found that the lots were on saturated soils. Lucas then hired a private licensed engineer, M.E. Thompson, Jr., to approve and certify the septic systems. Robbie Lucas Wrigley, Lucas's daughter, advertised the lots, showed them to prospective buyers, and leased them.

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[1] Not every count included all Defendants. See *infra* note 3.

The Army Corps of Engineers, the EPA, the MDH, and the Mississippi Department of Environmental Quality (DEQ) became concerned that Defendants were selling house lots and installing septic systems on wetlands. These agencies issued several cease and desist orders against Lucas and Thompson,[2] and the EPA sent letters to residents and organized a meeting of the residents to warn them of lot conditions and to tell them where wetlands were located on the property. It also met with BHA's counsel to attempt to designate the areas where they would allow development. These efforts were not fully successful.

The Government filed a 41-count indictment against Defendants in June of 2004 and then a superseding indictment, charging filling of wetlands without a *Section 404* permit from the Corps, failing to obtain *Section 402* National Pollutant Discharge Elimination System (NPDES) Permits for the septic tanks, mail fraud, and conspiracy to commit mail fraud and to violate *Sections 402* and *404* of the CWA.[3]

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[2] A July 15, 1997, letter from MDH to Thompson indicated that he must "either fully comply with the statutes when designing systems, or cease and desist immediately." A June 3, 1999, cease and desist order from the Army Corps of Engineers told Lucas that unpermitted placement of dredged or fill material into wetlands violated the CWA and ordered him to cease and desist constructing homes in a subdivision near Vancleave, Mississippi. An August 4, 1999, administrative order from the EPA notified Lucas that placement of fill into wetlands without a permit violated the CWA and ordered him to cease and desist from unpermitted filling.

[3] Count 1 charged all Defendants with Conspiracy to defraud buyers using the U.S. mails and conspiracy to violate the CWA; Counts 2-18 charged Lucas, Wrigley, Thompson, and BHA, Inc. with mail fraud; Count 19 charged Lucas, Wrigley, and BHA,

The district court denied pre-trial motions to dismiss the CWA charges. After the Government concluded its case, the court denied a joint motion for judgment of acquittal for all counts, except for counts 30-35 charging violations of the CWA. After a weekend recess and an argument from the Government that granting the motion would preclude appeal, the court reversed the acquittal. A jury convicted Defendants on all counts, and the court denied Defendants' joint motion to vacate the verdict, enter a judgment of acquittal on all counts, or to order a new trial. The court sentenced Lucas, Wrigley, and Thompson to prison terms; placed BHA, Inc. and Consolidated Investments on probation; and ordered all Defendants to pay restitution, special assessments, and fines.

III

A

The first and overarching question is jurisdiction -- whether the jury was properly required to find that the property at issue was subject to the CWA. Lucas, BHA, Inc., and Consolidated Investments, Inc., as well as Wrigley in adopting all arguments in Lucas's brief and Thompson in adopting the CWA jurisdiction issues raised in Lucas's brief, urge that the jury instructions failed to require the jury to find that the wetlands were "waters of the United States" and in

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Inc. with mail fraud; Counts 20-22 charged Lucas with violating Section 404 of the CWA; Counts 23-26 charged Lucas, Wrigley, and Thompson with violating Section 404 of the CWA; Counts 27-29 charged Lucas with violating Section 404 of the CWA; Counts 30-32 charged Lucas, Wrigley, and Thompson with violating Section 402 of the CWA; Counts 33-39 charged Lucas and Wrigley with violating Section 402 of the CWA; and Counts 40-41 charged Lucas with violating Section 402 of the CWA.

refusing its requested charge. The instructions stated in relevant part,

> The term navigable waters means waters of the United States. Whether a body of water is navigable-in-fact is determined by whether it is used or susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water.
>
> The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. . . . Not all wetlands fall under the protection of the Clean Water Act. However, wetlands that are waters of the United States are protected by the Clean Water Act. Wetlands are considered waters of the United States if they are adjacent to a navigable body of open water. Wetlands are adjacent to a navigable body of water if there is a significant nexus between the wetlands in question and a navigable-in-fact waterway. Some of the factors which you may wish to consider in determining whether there is a significant nexus include, but are not limited to: . . . flow rate of surface waters from the wetlands into a navigable body of water . . . evidence of any past or present contamination of a

> navigable body of water attributable to the discharge of pollutants on the wetlands . . . when, or to what extent, contaminants from the wetlands have or will affect a navigable body of water . . . .

Defendants argue that the court erred in not including their requested language that

> The Clean Water Act does not permit the federal government to impose regulations over tributaries that are neither themselves navigable nor truly adjacent to navigable waters . . . adjacency implicates a 'significant nexus' between the water in question and the navigable in fact waterway. If the government fails to prove beyond a reasonable doubt that the wetlands at issue in this case are in fact navigable or truly adjacent to i.e. lying near, close, contiguous, or adjoining a navigable waterway, you must find the defendants not guilty on counts Twenty through Forty-One.

They allege that the instructions, which did not include their proposed language, were in error because they "could have lead the jury to believe that they could find Defendants guilty under the CWA even if they found no significant nexus."[4]

We review alleged error in jury instructions for an abuse of discretion, reversing "only when 'the charge as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'"[5] A district court abuses its discretion in omitting a requested jury instruction only if the requested language "(1) is substantively correct; (2) is not substantially covered in the charge given to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present effectively a particular defense."[6]

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[4] Defendant Lucas's Brief at 55.

The court's instructions were not in error, nor was the court's omission of Defendants' requested instructions. The court's instructions required that the jury find that the wetlands were waters of the United States adjacent to navigable waters with a significant nexus between the wetland and the navigable-in-fact waterway to establish CWA jurisdiction. The instructions substantially covered Defendants' requested instructions by requiring adjacency[7] as defined by a significant nexus. The closing arguments also included the "significant nexus" language. The Government argued

> [T]he government has shown that there is a significant nexus between the wetlands on Big Hill Acres and navigable-in-fact waters. Showed that the surface from the Big Hill Acres site drains in three directions. The western portions of the site drain into Bayou Costapia. Bayou Costapia empties into the Tchoutacabouffa

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[5] *Treadaway v. Societe Anonyme Louis-Dreyfus,* 894 F.2d 161, 168 (5th Cir. 2000) (quoting *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 (5th Cir. 1979)).

[6] *United States v. Simkanin,* 420 F.3d 397, 410 (5th Cir. 2005).

[7] The term "adjacent" is substantially similar to Defendants' requested term of "truly adjacent."

> River, which then empties into the Gulf of Mexico. The central portions of the Big Hill Acres development drained through tributaries into Old Fort Bayou Creek. And Old Fort Bayou Creek connects to Old Fort Bayou, which is a protected coastal preserve emptying into the Gulf of Mexico. And the eastern portions drain into the headwaters of Little Bluff Creek, which then connects to Bluff Creek, which flows into the Pascagoula River and on to the Gulf of Mexico. And what we also demonstrated was that you could walk on wetlands from any one of these three areas on Big Hill Acres all the way to the navigable-in-fact waters.

Defendants also emphasized the need for a significant nexus finding in their closing arguments. Lucas's attorney argued, "And if you find that the land at Big Hill Acres is not adjacent to a navigable-in-fact body of water, does not have a significant nexus to a navigable water, you should return a verdict of not guilty on all the Clean Water Act counts." The court did not abuse its discretion in giving the CWA instructions.[8]

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[8] Defendants do not challenge the instructions on the grounds that they failed to include the *Rapanos v. United States* standard for navigable waters. This is understandable. The *Rapanos* plurality requires a channel adjacent to a wetland to be adjacent to "a relatively permanent body of water *connected to* traditional interstate navigable waters" to constitute "waters of the United States," 126 S. Ct. 2208, 2227 (2006), and the *Rapanos* concurrence requires a "significant nexus" between the wetlands and the navigable waters, meaning that "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of

B

The *second jurisdictional question* is the sufficiency of the evidence supporting the jury finding that the CWA reaches this property. All Defendants argue that there is insufficient evidence to establish jurisdiction under the CWA. "Our review of the sufficiency of the evidence supporting a conviction is narrow: we will affirm if a rational trier of fact could have found that the evidence established the essential elements of the crime beyond a reasonable doubt."[9]

Under the CWA, the United States has jurisdiction over the "waters of the United States,"[10] i.e., navigable waters. Wetlands adjacent to certain navigable waters are waters of the United States.[11] *Ra-*

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other covered waters more readily understood as navigable." 126 S. Ct. at 2248 (Kennedy, J., concurring). The instructions contained elements of both the plurality and concurring opinions by requiring the jury to find that the wetlands were "adjacent to a navigable body of open water," meaning "there is a *significant nexus* between the wetlands in question and a *navigable-in-fact* waterway." The judge instructed the jury to consider "flow rates of surface waters from the wetlands into a navigable water," an element similar to the connection required by the *Rapanos* plurality, and to consider "whether there is evidence of when, or to what extent, contaminants from the wetlands have or will affect a navigable water," an element similar to the concurrence's significant nexus standard.

[9] *United States v. Davis,* 226 F.3d 346, 354 (5th Cir. 2000).

[10] 33 U.S.C. § 1362(7).

[11] *See e.g., United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 133 ("We cannot say that the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States -- based as it is on the Corps' and EPA's technical expertise -- is unreasonable."); *Rapanos,* 126 S. Ct. at 2217

panos addressed wetlands adjacent to navigable waters and the tributaries of navigable waters, determining the types of adjacent tributaries and waters that count as waters of the United States and the connection that wetlands must have to these waters to fall under federal jurisdiction. The four-justice plurality defined waters of the United States, as "relatively permanent, standing or flowing bodies of water,"[12] concluding that

> establishing that wetlands . . . are covered by the Act requires two findings: First, that the adjacent channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.[13]

The plurality did not define "relatively permanent," finding that "we have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel . . . ."[14]

Its adjacency standard finds its roots in *Solid Waste Agency of Northern Cook Cty. v. Army Corps*

(recognizing that subsequent cases limiting federal jurisdiction over certain waters have not overrruled *Riverside Bayview*).

[12] 126 S. Ct. at 2221.

[13] *Id.* at 2227

[14] *Id.* at 2221 n.5.

of Engineers ("*SWANCC*").[15] *SWANCC* did not involve wetlands but held that "nonnavigable, isolated, intrastate waters" such as "an abandoned sand and gravel pit" were not waters of the United States.[16] The *Rapanos* plurality recognized that the Act allows states under delegated federal authority to regulate "wetlands adjacent" to "navigable waters . . . *other than those* [navigable waters] which are presently used, or are susceptible to use . . . as a means to transport interstate or foreign commerce," and that *SWANCC* was not to the contrary.[17] In other words, the Government has jurisdiction over waters that neighbor tributaries of navigable waters.[18]

The evidence presented at trial is sufficient by the plurality's measure of federal waters. One of the Government's expert witnesses at trial, Mike Wylie, described how he began at the westernmost drainage of the property and moved across, finding "flowing open water" north of the site and boat points on the western portion of the property "at the confluence of two tributaries." These tributaries had "strong flow" and "high velocity." Wylie showed photographs of his staff kayaking in tributaries connected to BHA wetlands as well as in several wetlands on the property. A jury could have reasonably concluded that these pictures show areas on the edge of the BHA property where "it is difficult to determine where the 'water' ends and the 'wetland' begins."[19] The Government maps of Big Hill Acres presented at trial also show Fort Bayou Creek, Bayou Costophia, tributaries to Bayou Catophia, and tributaries to Little Bluff Creek all connected to the development property, and all eventually flowing into the navigable Tchoutachabouffa River, the Pascagoula River, and the Mississippi Sound. Expert Peter Stokely testified that "there is a continuous band of wetlands and streams and creeks that lead from the site to the waters," and showed aerial photographs of "drainage and wetlands patterns on the site" as well as drainage and wetlands patterns that "branch up towards the site" and that lead "up on to the property itself."

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[15] 531 U.S. 159 (2001).

[16] *Id.* at 162.

[17] 126 S. Ct. at 2220.

[18] The definition includes wetlands that neighbor tributaries of navigable waters because the plurality definition includes wetlands adjacent to "a relatively permanent body of water *connected to* traditional interstate navigable waters." *Id.* at 2227 (emphasis added).

The evidence presented at trial is also sufficient by the measure of federal waters offered by the concurring justices. They concluded that the applicable standard should be the "significant nexus," evoking whether "wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable."[20] The Government presented evidence that the BHA wetlands control flooding in the area and prevent pollution in downstream navigable waters, evidence supporting the significant nexus standard of the *Rapanos* concurrence.

A four-justice dissent found that *United States v. Riverside Bayview Homes, Inc.*[21] controls the definition of waters of the United States and the Supreme Court should defer to "the Corps' judgment that treating adjacent wetlands as 'waters' would advance the 'congressional concern for protection of water quality and aquatic ecosystems."[22] The evidence of flood and pollution control provided by the BHA wetlands is sufficient by this measure, as well.

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[19] *Id.* at 2227.

[20] *Id.* at 2248 (Kennedy, J., concurring).

[21] 474 U.S. 121 (1985).

In sum, the evidence presented at trial supports all three of the *Rapanos* standards and the jury's finding that Lucas, Thompson, and Wrigley were "guilty beyond a reasonable doubt" "of knowingly causing the discharge of pollutants from a point source into waters of the United States without a permit as required by Section 404" of the CWA; that Lucas, Thompson, and Wrigley were guilty of "knowingly causing the discharge of pollutants from a point source; to wit, a septic system on [various lots], into waters of the United States without a permit as required by . . . Section 402" of the CWA; and that all Defendants were guilty "of conspiracy to commit an offense against the laws of the United States in violation of Title 18, United States Code, Section 371 . . . as alleged in Count 1 of the indictment," alleging, *inter alia*, that all Defendants "caused the discharge of sewage into wetlands that are waters of the United States" and "caused the discharge of pollutants into wetlands that are waters of the United States."

C

Finally, Defendants challenge the jurisdictional elements of the CWA charges on the basis that the "CWA as applied to the regulation of wetlands is unconstitutionally vague" and that "jurisdiction [under the Act] continues to be determined on an ad hoc basis."[23] The district court denied their pretrial motion on vagueness. We review this denial *de novo*.[24] Multiple agencies had warned Defendants that they were violating the CWA and state law by installing septic systems and dredging in federal waters.[25] This does not end our inquiry, as Defendants allege that they disputed the agencies' interpretation of the Clean Water Act.

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[22] 126 S. Ct. at 2244 (Stevens, J., dissenting).

Even in the absence of disputed agency warnings, the prevalence of wet property at BHA and an area network of creeks and their tributaries leading to the Gulf, some of which connected to wetlands on the property, should have alerted "men of common intelligence"[26] to the possibility that the wetlands were waters of the United States under the CWA. As we found in *Avoyelles Sportsmen's League, Inc. v. Marsh*,

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[23] Defendant Lucas's Brief at 38.

[24] *United States v. Nevers*, 7 F.3d 59, 61 (5th Cir. 2003) (reviewing *de novo* the question of unconstitutional vagueness); *Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm'rs*, 493 F.3d 570, 575 (5th Cir. 2007) (reviewing *de novo* denial of a motion to dismiss).

[25] The District Health Officer for the Jackson County office of MDH informed Thompson in 1997 that the septic systems that he approved in wetland soils violated state law. On June 3, 1999, the Corps of Engineers issued a cease and desist letter ordering Lucas to stop putting filled or dredged material into wetlands. On August 4, 1999, an EPA Administrative Order ordered Lucas to stop fill activity at BHA. On October 27, 1999 the Mississippi DEQ sent a letter to Lucas indicating that he was violating the CWA. On July 26, 2000 the EPA issued another cease and desist letter.

[26] *Ford Motor Co. v. Tex. Dept. of Transp.*, 264 F.3d 493, 507 (5th Cir. 2001).

> the landowners were well aware that at least a significant portion of their land was a wetland; if they wished to protect themselves from liability they could have applied for a permit and thus obtained a precise delineation of the extent of the wetland, as well as the activities permissible on the land.[27]

At trial, the Government presented evidence that one of Lucas's employees told Lucas that the property might contain wetlands, and that the property might be regulated.[28] Another employee also testified that he had warned Lucas that the property was wet.[29]

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[27] 715 F.2d 897, 917 (5th Cir. 1983).

[28] Direct Examination of John Mizelle. Q: "But when you were working for Mr. Lucas in doing the work you described, you told him that there might be a problem here and you knew about it; right?" A: "Possibly yes, sir." Q: "And that problem was that you were working in wetlands and thought you were; is that correct?" A: "I thought I was, yes, sir." Q: "And you raised that issue with Mr. Lucas?" A: "At one point, yes, sir." * * * Q: "So you explained to Mr. Lucas that the county [at another job that Mr. Mizelle worked on, unrelated to BHA] had gotten in trouble and had been fined for digging, trenching, side casting in wetlands, is that correct?" A: "Well, yes and no. I mean, [at the county job] I was working strictly in the water -- in the running creek or running bayou. It's totally different." Q: "But you explained -- you explained that there were" A: "We [the county] did get fined, yes, sir." Q: "And you explained that to Mr. Lucas?" A: "Yes, sir." Q: "And you explained that in the context because you were working in an area that you thought might be regulated in the same way; is that correct?" A: "It might be, yes." Q: "And that's why you raised it with Mr. Lucas -- " A: "Yes, sir." Q: "--is that correct? So you had a concern about it, and you raised that concern that maybe you were working in wetlands with Mr. Lucas; correct?" A: "Right."

[29] Direct Examination of Phillip Johnson.

Furthermore, the Government produced evidence that the language in the deeds conveying property from a timber company to Big Hill Acres indicated that the land was subject to "[w]etlands, environmental, hazardous or solid waste and flood plain laws, rules, and regulations affecting said property," while another deed from Robert Lucas to Big Hill Acres was a special warranty deed "with language saying any property which may constitute coastal wetlands as defined in the coastal wetland protection law is conveyed by quitclaim only." The district court did not err in denying the vagueness motion.

IV

A

We now turn from the jurisdictional question of whether the wetlands were waters of the United States, to challenges to the sufficiency of the indictment and the instruction to the jury regarding the CWA's NPDES permitting requirements. We first address the challenges to the sufficiency of the indictment with respect to the charges for discharging pollutants from septic systems into waters of the United States without an NPDES permit.

Counts 30-41 of the superseding indictment charged some of the Defendants with "knowingly caus[ing] pollutants, including sewage and domestic wastewater, to be discharged from a septic system, a point source, into wetlands that are waters of the United States without a permit issued under the authority of *Section 402* of the Clean Water Act."[30]

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[30] Counts 30-32 charged Lucas, Wrigley, and Thompson; Counts 33-39 charged Lucas and Wrigley, and Counts 40-41 charged Lucas.

Defendants challenge the sufficiency of the indictment with respect to the *Section 402* charges, arguing that "[b]ecause the regulation [enacting *Section 402*] unambiguously excludes septic tanks from the definition of 'treatment works treating domestic sewage,' Defendants were not legally required to obtain an NPDES permit, and therefore did not violate *CWA Section 402*."[31] Defendants moved to dismiss these counts before trial, arguing that "[t]he CWA regulations require a *Section 402* permit for point source discharges and for 'treatment works treating domestic sewage.' An individual on-site septic system is neither a 'point source' nor a 'treatment works treating domestic sewage.'"[32] The Government counters that "Defendants [on appeal] do not dispute that the release of sewage from septic tanks constitutes the discharge of a pollutant from a point source."[33]

Even if Defendants abandoned their argument that septic systems are not a point source, and it appears they have not, there remains the broader argument that the indictment is insufficient because *Section 402* NPDES permitting requirements do not apply to individual septic systems. Because the NPDES program requires permits for point source discharges and for certain treatment works, the definition of a point source is inherent to the applicability of NPDES permitting to septic systems.

40 C.F.R. § 122 and *Sections 123* and *124*, "implement the National Pollutant Discharge Elimination

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[31] Defendant Lucas's Brief at 33.

[32] Memorandum in Support of Motion to Dismiss Clean Water Act Counts (30-41) For Failing to Charge an Offense, at 3-4.

[33] Government's Brief at 51.

System (NPDES) Program under *sections 318*, *402*, and *405* of the Clean Water Act (CWA)." *Section 122.1(b)* addresses the "Scope of the NPDES permit requirement" and defines the NPDES permitting requirement for point sources, stating,

> The NPDES program requires permits for the discharge of "pollutants" from any "point source" into "waters of the United States." The terms "pollutant", "point source" and "waters of the United States" are defined at *§ 122.2*.

Section 122.2 defines these terms, in relevant part, as follows:

> Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged.

Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (*42 U.S.C. 2011 et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

> (a) Sewage from vessels; or

> (b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

After defining the scope of NPDES permitting to apply to any point source discharging a pollutant into waters of the United States, *Section 122.1(b)(2)* describes other sources (treatment works) that must meet additional sewage sludge requirements as part of the NPDES permitting process. *Section 122.1(b)(2)* provides,

> The [NPDES] permit program established under this part *also* applies to owners or operators of any treatment works treating domestic sewage, whether or not the treatment works is otherwise required to obtain an NPDES permit, unless all requirements implementing *section 405(d) of the CWA* applicable to the treatment works treating domestic sewage are included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or the Clean Air Act, or under State permit programs approved by the Admin-

> istrator as adequate to assure compliance with *section 405 of the CWA*.[34]

Treatment works under *§ 122.1 (b)(2)* do not include septic systems.[35] Thus, the NPDES permitting requirement applies to two types of sources -- point sources and treatment works. The Government urges that septic systems that discharge waste directly into federal waters of the United States are point sources and thus subject to the first permitting requirement under *§ 122.1(b)(1)*. Defendants, on the other hand, argue that privately-owned septic systems are not subject to NPDES permitting requirements, impliedly arguing that they are neither point sources nor treatment works.

The crux of Defendants' argument is that because septic systems are not treatment works under *§ 122.1(b)(2)*, they cannot be subject to NPDES permitting. But as the Government argues, treatment works are defined separately from point sources in the regulation: point sources are subject to the permitting requirement, and certain treatment works are additionally subject to these requirements. In other words, because *§ 122.1(b)(2)* provides that NPDES permitting "also applies to owners or operators of any *treatment works treating domestic sewage*, whether or not the treatment works is otherwise required to obtain an NPDES permit,"[36] the provision "is not exclusionary, but *includes* additional sources that are not *otherwise* covered."[37] *Section 122.1(b)(1)* provides that point sources are subject to NPDES permitting, the argument concludes, and that is the definition that applies here. *Section 122.1(b)(2)*, defining treatment works that are also subject to NPDES permitting, is not the basis for NPDES permitting in this case. *Section 122.1(b)(2)*'s exclusion of septic systems does not diminish *§ 122.1(b)(1)*'s applicability to septic systems. We agree with this reading.

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[34] Emphasis added.

[35] *See infra* note 38 and accompanying text.

[36] Emphasis added.

[37] Government's Brief at 52.

Section 122.1(b)(1) defines the sources requiring NPDES permits, namely point sources that discharge pollutants into U.S. waters. *Section 122.1(b)(2)* defines additional sources that must either obtain NPDES permits or fully meet the sewage disposal requirements of *§ 405* of the CWA. Section *122.1(b)(2)* specifically exempts septic systems from its requirements; it incorporates the definition of treatment works from *§ 122.2*, and this definition "does not include septic tanks or similar devices."[38] But *§ 122.1(b)(2)* does not address the sources under *§ 122.1(b)(1)* to which NPDES permitting applies. Rather, it implements NPDES permitting for certain sources of sewage sludge subject to special sludge disposal requirements under the CWA.

The background material to the amendments incorporating sewage sludge disposal into the NPDES permitting program confirms this reading of the statute. It states that

> the amendments direct that any permit under *section 402* of the Act (NPDES permits) issued to a POTW or any other treatment works treating domestic sewage *shall include the sludge technical*

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[38] 40 C.F.R. § 122.2.

> *standards*, unless such requirements have been included in a permit issued under subtitle C of the Solid Waste Disposal Act, Part C of the Safe Drinking Water Act, MPRSA, or the Clean Air Act, or under State permit programs approved by the Administrator.[39]

By exempting individual septic systems from these technical sludge disposal and treatment standards, EPA prevented homeowners and other operators of individual septic systems from facing these requirements. The sewage sludge regulations aim primarily at "safe use and disposal of sewage sludge," allowing permitting that is "compatible with beneficial reuse projects [for sludge] such as agricultural land application."[40] Once an entity physically removes sewage from an individual septic tank, the owner of that tank no longer has control over the disposal of the waste[41] and should not have to comply with sewage sludge standards. *Section 122.1(b)(2)* therefore aims at the disposers, not the initial producers and dischargers, of sludge.[42]

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[39] 54 F.R. 18716 (EPA 40 C.F.R. § 122, 123, 124, and 501, May 2, 1989).

[40] *Id.*

[41] *See id.* ("To regulate individual septic tanks (whether serving one or several households) [under the sewage sludge disposal regulations] obviously would be extremely difficult and inefficient. It would also be impractical in terms of achieving environmental results since the owners and operators of septic tanks have no effective control over the actual disposition of septage pumped from their tanks (i.e., *they cannot control the entities who pump and dispose of the septage*" (emphasis added)).

[42] *See id.* ("Part 122 contains a second part to the definition of 'treatment works treating domestic sewage.' It provides that the

In sum, *40 C.F.R. § 122.1 (b)(1)* defines the point sources that are subject to NPDES permitting. *40 C.F.R. § 122.1(b)(2)* is a separate portion of the regulation, applying sewage sludge disposal requirements to entities that might not otherwise be regulated by NPDES permits under the point source requirement. Although septic systems are explicitly excluded from these sludge disposal requirements, Defendants have not persuaded us that septic systems are not "point sources" that discharge "pollutants" into U.S. waters under *40 C.F.R. § 122.1 (b)(1)* and that the indictment fails to state an offense.[43] The septic systems on BHA

Regional Administrator may designate a particular facility as a 'treatment works treating domestic sewage' for the purpose of *CWA section 405(f)* where necessary to protect public health and the environment from poor sludge quality, use, handling or disposal practices, or to ensure compliance with 40 C.F.R. Part 503. This enables the Regional Administrator to carry out the intent of Congress to ensure that all persons subject to the standards for sludge use and disposal (*e.g., persons who handle sewage sludge but who do not generate or treat sewage sludge*) operate in compliance with such standards, and that adverse effects on the environment resulting from poor sludge quality, use, handling or disposal can be minimized. The authority to designate facilities as 'treatment works treating domestic sewage' on a case-by-case basis is not required for either NPDES (Part 123) or non-NPDES (Part 501) State programs. Under today's final rule, States are required to have a program that requires permits for POTWs and other treatment works as defined in *§ 501.2*, but are free to develop any appropriate program to regulate other users and disposers of sewage sludge to ensure compliance with the technical standards." (emphasis added)).

[43] We recognize that we have not formerly encountered a case charging an operator of a septic system with failure to obtain an NPDES permit. This is likely because few cases have presented us with these unique circumstances, where a developer hired an engineer to approve and install septic systems directly in wetlands that are waters of the United States, thus making a sys-

are "containers," thus suggesting that they fall under the definition of "point source" incorporated into *Section 122.1(b)(1)*, and septic systems hold "solid waste" and "sewage" that fit within the definition of "pollution" as defined by *Section 122.2*. The exemptions to *§ 122.1(b)(1)*'s NPDES permit requirement list sewage from vessels but do not exempt individual septic systems from the permitting requirement.[44]

We have never addressed whether the Clean Water Act can require NPDES permits for septic systems, but by the language of the Act the septic systems at issue in this case are point sources that discharged pollutants into waters of the United States and required NPDES permits. Other case law provides support for this reading. The Supreme Court's plurality decision in *Rapanos*, in the context of *§ 404 of the CWA*, found that,

> many courts have held that . . . upstream, intermittently flowing channels themselves constitute "point sources" under the Act. The definition of "point source" includes "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *33 U.S.C. § 1362(14)*. We have held that the Act "makes plain that a point source need not be the original

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tem that is typically a diffuse, non-point source into a point source.

[44] *See* 40 C.F.R. § 122.3.

> source of the pollutant; *it need only convey the pollutant to 'navigable waters.'"*[45]

The Court, in determining that intervening conduits can be point sources, cited to *United States v. Ortiz*[46] and *Dague v. Burlington*.[47] In *Ortiz*, the Tenth Circuit reversed an acquittal after a jury trial on a charge of "discharging pollutants from a point source (a storm drain) into waters of the United States . . . without [an NPDES] permit."[48] Defendant dumped pollutants into a toilet, and the pollutants eventually emptied through a storm drain into the Colorado River.[49] Similar to *Rapanos*, *Dague* did not involve a violation of NPDES permit requirements but addressed the definition of "point source" that is used in NPDES permitting.[50] The Second Circuit held that where pollutants ran off from a landfill into a pond and then through a railroad culvert that conveyed the pollutants into a surrounding marsh, the railroad culvert was a point source.[51] The Second Circuit followed a definition similar to the Supreme Court's in distinguishing point sources from nonpoint sources, identifying point sources as "pollutants . . . discharged from 'discernible, confined, and discrete conveyance(s)' either by gravitational or nongravitational means."[52]

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[45] 126 S. Ct. at 2227 (emphasis added) (quoting *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe,* 541 U.S. 95, 105 (2004)).

[46] 427 F.3d 1278 (10th Cir. 2005).

[47] 935 F.2d 1343 (2d Cir. 1991).

[48] 427 F.3d at 1281.

[49] *Id.* at 1279-81.

[50] 33 U.S.C. § 1311, the statute addressed in *Dague,* uses the definition of point source from *33 U.S.C. § 1362* (*see Dague, 935 F.2d at 1354*) and is identical to the definition of point source for NPDES permitting contained in 40 C.F.R. § 122.2. Section 1362, like § 122.2, defines point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture."

Several district courts have found that pollutants discharged from failed septic systems into navigable waters are point sources for the purposes of the Clean Water Act. In *United States v. Evans*, where the "discharge alleged [was] overflow from a septic tank,"[53] the Middle District of Florida held that "the affidavits established that pollutant was being discharged from a *point source* into the creek."[54] In that case, some of the sewage was bypassing the septic system and flowing directly into the creek.[55] In *Minnesota Center for Environmental Advocacy v. United States EPA,* the court found that a "straight pipe septic system,"[56] one that disposes "untreated sewage directly via a pipe to rivers, lakes, drain tiles, or ditches," is a point source under 33 U.S.C. § 1362(14).[57] In *Friends of Sakonnet*

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[51] 935 F.2d at 1355.

[52] *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (1980) (quoting 33 U.S.C. § 1362(14)).

[53] No. 3:05-cr-159(S3)-J-32MMH, 2006 U.S. Dist. LEXIS 94369 at *90, n.32 (M.D. Fla. July 14, 2006).

[54] *Id.* at 132.

[55] *Id.* at 108.

[56] No. 03-5450, 2005 U.S. Dist. LEXIS 12652 at *17 (D. Minn. June 23, 2005).

[57] *Id.* at 17-18.

v. Dutra[58] the court held, "The owners of [a] [v]illage [development] septic system are required to obtain an NPDES (national pollutant discharge elimination system) permit under *33 U.S.C. § 1342* as they are discharging pollutants into navigable waters."[59] The 33 homes had sewage lines connecting to a "large communal septic tank,"[60] and the sewage then "deposited in a leach field"[61] and was chlorinated, then sent through a pipe into the Sakkonet River. When the septic system failed, raw sewage flowed into the river. The court held that the system was a "privately owned treatment works" and that "[t]here is no question . . . that the owners of the failed septic system are liable under *33 U.S.C. § 1311* [including 'effluent limitations for point sources, other than publicly owned treatment works']."[62]

The septic systems on BHA are not a communally-used septic system or a straight-pipe system and are not privately owned treatment works. However, the evidence produced at trial was sufficient to support a finding that they were a point source and could be subject to NPDES permitting requirements under the CWA. The indictment was sufficient in charging a violation of the CWA for failure to obtain NPDES permits for the septic systems.

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[58] 738 F. Supp. 623 (D. R.I. 1990).

[59] *Id.* at 630 n.13.

[60] *Id.* at 627.

[61] *Id.*

[62] *Id.*

The jury instructions on point source pollution from BHA under *Section 402 of the CWA* were also sufficient. All Defendants object to the instructions as "misleading because the language in the instruction stated multiple times 'from a point source, to wit, a septic system,'"[63] arguing that this language could have suggested that a septic system is a point source and established an essential element of the crime. The "to-wit" language arises frequently within the jury instructions because that language was part of the counts in the indictment, which the court read to the jury. The court's instructions after reading the counts did not include the phrase "to wit, a septic system" but instead required the jury to find,

> First, that the defendants knew that they were discharging or causing to be discharged pollutants; Second, *from a point source*; Third, that the defendants knew the physical characteristics of the property into which the pollutant was discharged that identify it as a wetland; Fourth, that the defendants knew of the facts establishing the required link between the wetland and waters of the United States; And fifth, that the defendants knew that they did not have a permit as required by the National Pollutant Discharge Elimination System Program, *Section 402* of the Clean Water Act.[64]

These instructions did not establish that a septic system was a point source; they required the jury to find beyond a reasonable doubt that element of the crime. As the court found in overruling Thompson's attorney's objections to the instruction, "the essential element[] -- Element No. 2 requires the jury to find beyond a reasonable doubt that there is a point source without telling them what it is. It's up to them to decide based on the evidence that they've heard whether these septic tanks even qualify as a point source."

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[63] Defendant Lucas's Brief at 55.

[64] Emphasis added.

Defendants also argue that "the law imposes the requirement to obtain a Section 402 NPDES permit solely upon the actual discharger or operator of a facility" and that the court's instructions misstated the law by allowing the jury to convict defendants for "causing" a discharge. The court, in overruling Defendants' objections to the instruction, found,

> I think the government's theory of the case is that they -- although they may not have discharged the pollutant, they created the instrumentality through which a pollutant could have been discharged. And I'll let the jury -- I'll let the jury make a determination as to whether or not that theory is sufficient to satisfy the causing of a pollutant or a causing of a discharge of a pollutant.

The court instructed the jury,

> For you to find the defendants guilty of these crimes, you must be convinced that the government has proved each of the following beyond a reasonable doubt: First, that the defendants knew that they were discharging or causing the discharge of pollutants; Second, from a point source;

> Third that the defendants knew the physical characteristics of the property into which a pollutant was discharged that identify it as a wetland; Fourth, that the defendants knew of the facts establishing the required link between the wetland and waters of the United States; And fifth, that the defendants knew that they did not have a permit as required by *Section 404* of the Clean Water Act.

Although the court instructed the jury that it could find defendants guilty for "causing" a discharge, Lucas's attorney argued in closing,

> The EPA wants to hold Mr. Lucas responsible for septic tank problems even though he had no control over what the owners of those systems were doing to them or how they were using them. Mr. Lucas and Big Hill Acres do not operate septic systems on mobile homes in Big Hill Acres. And the evidence showed that the EPA doesn't require any kind of permit to operate a septic system. But the government is here telling you that it's a crime for Mr. Lucas not to have had a permit or, even worse, do what the Department of Health and Environmental Protection Agency encouraged him to do [i.e., take action to counter the failing septic systems].

Defendants' argument against the court's instructions turns partly on the construction of 40 C.F.R. § 122.21(b), providing, "When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit" and on whether an individual who causes a discharge can be considered an operator. Defendants point to *Newton County Wildlife Ass'n v. Rogers*,[65] where the court held that the Forest Service, in approving timber sales, did not need to obtain NPDES or dredge and fill permits. If any permits were required, the contractors doing the harvesting and building roads would have the responsibility of obtaining them.[66]

The Government argues that Congress amended the CWA in 1987 to broaden criminal liability under the Act and in doing so, provided that its intent was to "provide penalties for dischargers or individuals who knowingly or negligently violate *or cause the violation of* certain of the Act's requirements." [67] The Government further argues that "defendants may . . . be held indirectly liable for the discharges as aiders and abettors under *18 U.S.C. § 2*. In each of the CWA counts, defendants were charged as principals pursuant to this provision. A principal is criminally culpable for causing an intermediary to commit a criminal act even where the intermediary has no criminal intent and is innocent of the substantive crime."[68] We are persuaded by the latter argument.

In *Abston Construction Co.*, we addressed the question of causation in the context of defining a point source of pollution. The Sierra Club brought a citizen suit against a mining company that constructed sediment basins to catch the run-off from spoil piles.[69] The basins occasionally overflowed during rainy weather, thus discharging pollutants into a creek.[70] The company argued that it was not legally responsible for the discharge because "natural" discharge in the form of rain caused the discharge from the spoil piles;[71] it argued that the discharge from the spoil piles was not a point source of pollution. We held that although the mining company had not created the gullies and ditches formed by the rainwater, which channeled the mining pollutants into the creek, the company was responsible for a point source discharge because it collected the "rock and other materials" that eventually caused creek pollution.[72] Specifically, we held that

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[65] 141 F.3d 803 (8th Cir. 1998).

[66] *Id. at 810.*

[67] Government's Brief at 79 (quoting H.R. Rep. No. 99-1004 at 136 (1986) (Conf. Rep.); H.R. Rep. No. 99-189, at 29-30 (1985) (emphasis added)).

[68] Government's Brief at 80-81.

> [n]othing in the [Clean Water[73]] Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water.[74]

This case did not apply specifically to NPDES permits, however. Defendants' activities in constructing the septic systems fall somewhere between the standards in *Newtown County Wildlife Ass'n* and *Abston Construction Co.* Under the *Newtown County Wildlife Ass'n* standard, Defendants here could have been considered the "operators," as they were directly responsible for designing and certifying the septic systems that collected and discharged the waste, although a contractor handled the actual installation. The Government also provided evidence that Lucas voluntarily worked on the septic systems when owners complained that they were failing, filling them with dirt and extending the drain fields.[75] In *Abston Construction Co.*, the mine created the waste (rocks and other mining materials) that was collected in a point source, the sediment basins; at BHA, Defendants did not create the waste collected in the septic systems.

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[69] 620 F.2d at 43.

[70] *Id.*

[71] *Id.* at 44.

[72] *Id.* at 45.

[73] The opinion referred to the Clean Water Act by its full name, the Federal Water Pollution Control Act.

[74] *Id.* at 45.

We have not addressed whether individuals and corporations "causing" discharge are required to obtain NPDES permits. Several district courts have. In *Evans,* the Middle District of Florida upheld the constitutionality of searches challenged by the owner and operator of a labor camp. The Government had obtained search warrants to investigate, among other things, potential violations of the Clean Water Act for discharging human waste into a creek without an NPDES permit. Although the waste came from the workers in the labor camp, the Defendants may have constructed the "illegal bypass" around the septic system[76] that allowed raw human waste to flow through a PVC pipe into a creek or ditch.[77] *Evans* asked, of course, whether there was probable cause to believe that there was CWA jurisdiction. *Friends of Sakkonet* addressed a treatment works rather than a point source but also speaks to the issue of causation. There, the defendants were the corporate owners and former landowners of the land holding a large septic tank serving 33 homes. The district court granted summary judgment under the federal CWA against the "corporate owner of the land on which the failed sewage system is located" and "the sole trustee of the Trust" that owned the corporation.[78]

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[75] Defendants provided evidence that the state and the EPA had determined that they would not prosecute installers at BHA for temporary repairs of septic problems that Defendants claimed at trial were the lot owners' responsibility. The Government presented evidence that Lucas did not follow required procedures for the repairs and attempted to repair at least one septic system on an uninhabited lot that he wished to re-sell.

Defendant Lucas hired M.E. Thompson to design and certify the septic systems that discharged pollutants into navigable waters. Although Defendants' personal septic waste was not the waste that entered federal wetlands, the attempted technical distinction between the "discharge of any pollutant" and "causing" this discharge is unavailing here. The lot owners eventually used the systems, but Defendants were the cause of their operation and their unlawful discharge from the systems. At minimum, they aided and abetted the operation of the septic systems and the resulting discharges. A jury instruction allowing conviction for "causing" the discharge of pollutants was not an abuse of discretion.

V

In addition to challenging the sufficiency of the indictment and jury instructions pertaining to

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[76] 2006 U.S. Dist. LEXIS 94369 at *108.

[77] *Id.* at 108-09.

[78] 738 F. Supp. at 626, 635.

NPDES permitting, all Defendants challenge the court's denial of their motion for acquittal on constitutional grounds. Counts 30-35 of the superseding indictment charged Lucas, Wrigley, and Thompson with causing the discharge of pollutants into waters of the United States without a *Section 402* permit. Following the close of the Government's case, Defendants moved for acquittal on all counts. The district court initially granted acquittal for counts 30-35 but after a weekend recess reversed its ruling. The court, in reversing the acquittal, stated,

> I could be in error. And if I am in error, I should be corrected. And the only way to preserve that would be to take the matter -- reserve ruling on the *Rule 29* motion and allow the case to go forward to the jury with proper instructions.

The court, in other words, questioned its initial determination that there was "no evidence" on the counts. This decision did not subject Defendants to double jeopardy, and the court did not abuse its discretion in denying their acquittal motion.

Reversal of a final judgment of acquittal would place a defendant in double jeopardy. "A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed . . . "[79] But an initial ruling of acquittal followed by a change of mind before any further proceedings occur is not a final judgment. *Smith v. Massachusetts* confirmed that "a prosecutor can seek to persuade the court to correct its legal error [i.e., an "ill-considered acquittal ruling[ ]"] before it rules, or at least before the proceedings move forward." [80]

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[79] *United States v. Scott,* 437 U.S. 82, 91, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978).

The district court made its initial ruling outside of the jury's presence at the end of the week and announced that the Government could appeal the ruling. The court considered the Government's arguments against the ruling during the weekend recess[81] and, before the trial progressed any further, reversed its initial ruling on the acquittal. The court's final ruling was a denial of the motion for acquittal on the CWA counts, and no double jeopardy attached after the initial ruling.

Defendants also contest counts 30-35 on the grounds that the Government's evidence for those counts did not prove CWA jurisdiction, and that the court should have granted the motion for acquittal on these counts. "So long as a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt, the evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt."[82] Where a reasonable trier of fact could find guilt beyond a reasonable doubt, "the jury [is] free to choose among the reasonable constructions of the evidence: one of which [is] consistent with [Defendant's] guilt,"[83] and the judge need not grant a motion for acquittal. We are persuaded that there was sufficient evidence to support conviction on the counts, including evidence that the wetlands on BHA were waters of the United States under the *Rapanos* standards, as we have discussed.

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[80] 543 U.S. 462, 474 (2005) (citing *Price v. Vincent,* 538 U.S. 634, 637-38, 643-43, and n. 1 (2003)).

[81] The prosecution argued that despite the court's intent to allow an appeal of the judgment, the Government would not be able to appeal a ruling of acquittal on the counts.

[82] *United States v. Loe,* 262 F.3d 427, 434 (5th Cir. 2001).

[83] *Id.*

VI

All Defendants argue that the indictment was insufficient on the mail fraud charges and that the evidence does not support their mail fraud conviction, alleging that a breach of the warranty of habitability is necessary to show fraud for lot sales in Mississippi and that all lot buyers signed contracts making a breach of the warranty impossible.[84] Defendants also allege that no one testified that the lots were "uninhabitable" and that the Government failed to prove that septic systems backed up and caused problems because of their placement in wetlands. They conclude that a "breach of a warranty of habitability" cannot support the mail fraud conviction.

The mail fraud charges were not limited to allegations of a breach of warranty. Rather, they charged a broader scheme of fraudulent misrepresentation that induced buyers to purchase lots and use of the mails to further this scheme. The indictment charged, in relevant part,

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[84] The contract contained a waiver provision stating, "It is understood and agreed that Buyer . . . has inspected the above described property and that the same is, and has been purchased by Buyer as a result of said inspection and not upon any representation made by Seller or its agents . . . that Buyer waives any and all claims for damages because of any representation made by any person whomsoever; and that Seller or its agent or agents shall not and are not responsible for any inducement, promise, representation, agreement, condition, or stipulation not specifically set forth herein."

> in advertisements to the public and in statements to individuals, represented to potential purchasers of Big Hill Acres lots that the lots were habitable and suitable for home sites when in fact they were not . . . . submitted . . . a letter certifying that the below-ground septic system . . . had been installed in compliance with Mississippi state law when in fact it was not [charge against M.E. Thompson] . . . . represented to customers that the lots they were marketing at Big Hill Acres development had or would have properly designed and correctly installed septic systems that made the lots suitable for purchase as home sites . . . entered into contracts with purchasers of Big Hill Acres to buy home sites that were not suitable for habitation requiring the purchasers to make monthly payments to the Big Hill Acres office in Lucedale, Mississippi . . . knowingly caused a payment for the sale of the lot [identified in counts 2 through 18] to be delivered by the United States Postal Service to BIG HILL ACRES, INC., . . . each such mailing being a separate count . . . .

The mail fraud statute attaches criminal liability to

> Whoever, having devised or intending to devise *any* scheme or artifice to defraud, or for *obtaining money or property by means of false or fraudulent pretenses*, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any

> post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . or takes or receives therefrom, any such matter or thing . . . . [85]

Specifically, a jury must find three elements to support a mail fraud conviction: "'(1) a scheme to defraud; (2) use of the mails to execute that scheme; and (3) the specific intent to defraud.'"[86] A misrepresentation must be material to constitute fraud under the statute,[87] meaning it "has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed."[88]

We are not persuaded that the disclaimer provision of these individual sales contracts insulates Defendants from the federal charges[89] or that the fraud alleged and shown in this case was limited to a violation of that narrow warranty.

We have not addressed the question of whether a working septic system is required for the implied warranty of habitability that arises from a contract of the sale of a house and land under Mississippi law. Mississippi courts have held that the warranty covers mobile homes and septic systems.[90] We have determined in an Alabama case that a realtor's misrepresentation that a vacant lot's soil was suitable for a septic tank[91] may have constituted intentional and negligent misrepresentation and a breach of implied warranty, remanding to the district court to consider the issue.[92]

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[85] 18 U.S.C. § 1341 (emphasis added).

[86] *United States v. Dotson,* 407 F.3d 387, 391-92 (5th Cir. 2005) (quoting United States v. Strong, 371 F.3d 225, 227 (5th Cir. 2004)).

[87] *See Neder v. United States,* 527 U.S. 1, 22, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

[88] *United States v. Harms,* 442 F.3d 367, 372 (5th Cir. 2006), *cert. denied,* 127 S. Ct. 2875 (2007).

[89] Defendants do not cite to any case law for this proposition.

The contracts for the lots purportedly waived the liability of Defendants and their agents for any representations made outside of the written contract, including "inducements." A broad contract waiver cannot exempt Defendants from federal mail fraud conviction in this case. "The Supreme Court has repeatedly noted that misrepresentation cannot be justified by incorrectness of the position of the party to whom the misrepresentation is made."[93] Although residents inspected the lots and verified this inspection in the contract.

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[90] *See, e.g., Moorman v. Tower Management Co.,* 451 F. Supp. 2d 846, 851 (S.D. Miss. 2006) (quoting *Staley v. Bouril,* 718 A.2d 283, 284-85 (1998)) (finding that the warranty of habitability applies to mobile home lots and citing the *Staley* case, which "recognized that 'in leasing improved lots in a mobile home park,' tenants 'bargain for a similar bundle of goods and services,' including, for example, 'potable water, adequate septic service, and proper electrical connections,' all of which are 'essential components of a habitable residence'").

[91] *See Mann v. Adams Realty Co., Inc.,* 556 F.2d 288, 291 (5th Cir. 1977) (The realtor had stated that "[e]verything [was] fine" concerning the septic system).

[92] *Id.* at 297.

[93] *Dotson,* 407 F.3d at 393-94 (citing *United States v. Mandujano,* 425 U.S. 564 (1976) ("sanctions for false statements or perjury allowed even when inquiry was unconstitutional") and *Dennis v. United States,* 384 U.S. 855 (1966) ("'It is no defense to a charge based upon [conspiracy to circumvent a law through deceit] that the statutory scheme sought to be evaded is somehow defective.'")).

Defendants made misrepresentations that directly contradicted inspecting buyers' observations. Wrigley misrepresented the dryness of the site, for example, when buyers noticed wetlands and wetlands vegetation and questioned her about the wetlands.

The Government presented evidence that Defendants, despite warnings from agencies that they were installing septic systems in saturated soils, advertised the lots as "high and dry" and, when asked by owners if there were wetlands on the property, responded that there were none. "[T]he mail fraud statute does not require a completed fraud, just that the defendant has 'devised or intend[ed] to devise' a scheme to defraud,"[94] but the Government presented evidence of a completed fraud, indicating that the lots were not in fact dry, as Defendants had advertised, and that residents encountered sewage problems on their wet lots.[95] At least one witness also testified that Wrigley or Lucas added language to her contract after she signed it; the language stated that she had been notified about potential wetlands on her property, while the owner testified that Defendants had not informed her of wetlands or shown her any wetlands maps when she was purchasing the property. Other witnesses testified that their land was wet and that their septic systems backed up. A witness who had asked Wrigley whether there were any wetlands on the property testified that it "would have made a huge difference" in her decision to buy the property if Wrigley had informed her that it contained wetlands. Although Defendants presented some evidence that the septic systems failed because lot owners had misused their septic systems, other lot owners testified that they only disposed of proper waste in their systems, yet the systems still failed.[96] Based on this evidence, "a reasonable trier of fact could conclude that the Government proved beyond a reasonable doubt"[97] that Defendants made material misrepresentations in selling the lots and that the septic systems failed because they were placed in wetlands.

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[94] *United States v. Ratcliff,* 488 F.3d 639, 645 n.7 (5th Cir. 2007).

[95] Patrick Brossett, Sr. testified that he "had a problem with it [the septic] flooding up on the ground all the time. Every time it rains, it comes up." Winford Patterson testified that "within the first month" his septic system "filled up. Commodes wouldn't flush." Sewer "[w]ater was coming up into the bathtubs and the sinks and the showers." He testified that he had to drain waste from the system out of his yard and "into the property ditch." Patricia Griswold testified that sewage "was still backing up inside the trailer even after the septic tank was pumped."

The Government also presented evidence that Defendants used the mail to accomplish fraudulent sales: they caused lot owners to send payments through the mail to the BHA, Inc. office and sent receipts through the mail for these payments.[98] We are persuaded that the mailings were sufficiently connected to the fraudulent misrepresentations. "One 'causes' an article to be delivered by mail if he acts with the knowledge that use of the mail will follow in the ordinary course or if use of the mail is reasonably foreseeable . . . ."[99]

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[96] Pansy Maddox, district environmental supervisor for MDH, also testified that "[m]ost of the systems were failing because fled drains had been placed in soils that were too wet and do not drain adequately to absorb the wastewater."

[97] *Harms,* 442 F.3d at 374.

[98] Defendants allege that "proof of mailing was lacking for Counts 10 and 16." Count 10 involved lot GG-4. Patricia Griswold, the former owner of lot GG-4, testified that she made a payment in the mail for that lot and verified that a receipt for that payment (Government's Exhibit 50(ii)) came through the mail. Count 16 involved lot YY-1. The owner "involved in purchasing YY-1 and YY-2" testified that "[w]e paid cash and sometimes by check" for the lot payments. "We mailed them." He also

After purchasing a lot based on fraudulent misrepresentations, prospective lot owners committed themselves to years of installment payments to be made through the mail. Although many owners made payments after the EPA had informed them that their lots were on wetlands, these payments connected directly back to contracts that they signed prior to agency warnings.

Defendants challenge the court's instructions on mail fraud, arguing that the court abused its discretion by failing to instruct on materiality. For jury instructions, "the omission of an element is subject to harmless-error analysis."[100] Although the district court erred in stating that the Fifth Circuit Pattern Jury Instructions for mail fraud do not mention materiality,[101] the district court's instructions defined false representations as constituting "a half truth, or effectively conceal[ing] a *material* fact, provided it is made with the intent to defraud."[102] But this does not

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verified that Government's Exhibit 79(a) contained "envelopes that Mr. Lucas had given us to send our money in to them."

[99] *United States v. Blankenship*, 746 F.2d 233, 240 (5th Cir. 1984).

[100] *Neder*, 527 U.S. at 10.

[101] The pattern jury instructions require, *inter alia*, "That the scheme to defraud employed false material representations." 2001 Fifth Circuit Criminal Jury Instructions.

[102] Emphasis added.

end our inquiry. The inclusion of the word "or" between "half truth" and "conceals a material fact" could have suggested to the jury that a false representation could be defined as a half truth that concealed a non-material fact. The court's instruction, under either definition of false representation -- one that is a "half truth" or "conceals a material fact" -- correctly required the jury to find, for a mail fraud conviction, that defendants "knowingly created a scheme to defraud. That is, obtain money by *inducing* individuals to lease, rent or purchase lots or subdivided real property in [BHA] *under representations that were false.*"[103]

The court's instructions included a requirement of materiality. As indicated above, "a false statement is material if it has a natural tendency to *influence*, or [is] capable of influencing, the decision of the decision-making body to which it was addressed."[104] By instructing the jury that the misrepresentations must have induced individuals to lease the property to constitute fraud, the court required that the jury establish materiality.

VII

Moving from mail fraud to conspiracy, M.E. Thompson -- the engineer who designed and certified the septic systems -- and Wrigley and Lucas,[105] contest the sufficiency of the conspiracy charge in the indictment and the sufficiency of the evidence proving conspiracy. They also argue that because the conspiracy convictions "are contingent upon the underlying charges" of violation of the CWA and mail fraud, there is insufficient evidence to support the conspiracy charges. Because we have found sufficient evidence to support the underlying charges, we need not address their final argument.

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[103] Emphasis added.

[104] *Neder,* 527 U.S. at 16 (internal quotations and citations omitted, emphasis added).

[105] Lucas, BHA, Inc., and Consolidated Investments, Inc. briefed the conspiracy issues. Wrigley and Thompson adopted the arguments from that brief. Thompson additionally argued that the evidence did not support his conviction for conspiracy.

We review "the sufficiency of an indictment *de novo*, taking the indictment's allegations as true."[106] To prove a conspiracy under § 371, the evidence must prove and the indictment must allege "(1) an agreement between the defendant and a co-conspirator to violate a law of the United States; (2) an overt act by one conspirator in furtherance of the conspiracy; and (3) the specific intent to further an unlawful objective of the conspiracy."[107] The agreement "must be arrived at knowingly," and "'[m]ere association with those involved in a criminal venture is insufficient to prove participation in a conspiracy.'"[108] The Government may prove an agreement using "circumstantial evidence," and "in a conspiracy case: an agreement may be inferred from concert of action, voluntary participation may be inferred from a collocation of circumstances, and knowledge may be inferred from surrounding circumstances."[109]

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[106] *United States v. Ratcliff*, 488 F.3d 639, 643 (5th Cir. 2007).

[107] *United States v. Bieganowski*, 313 F.3d 264, 276 (5th Cir. 2002).

[108] *Id.* at 277 (quoting *United States v. Ballard*, 663 F.2d 534, 543 (5th Cir. 1981)).

[109] *Id.* (internal quotations omitted).

With respect to the sufficiency of the indictment, Defendants only challenge the unlawful objective prong, arguing that the object of the conspiracy -- the sale of wetlands -- was not illegal. The indictment sufficiently alleged unlawful objectives and placed Defendants on notice of the offenses charged. The unlawful objectives charged included, *inter alia*,

> Use of the United States Mail in furtherance of a scheme to defraud by inducing individuals to lease, rent, and purchase residential lots in the Big Hill Acres development . . by making material representations they [Defendants] knew to be false that the lots were suitable for habitation when they were not, in violation of Title *18, United States Code, Section 1341* * * * By installing septic systems in water-saturated soils and wetlands, knowingly causing pollutants, including human waste, to be discharged from point sources, into waters of the United States, specifically, wetlands located in Vancleave, Mississippi, without a permit . . . in violation of Title *33, United States Code, Section 1319(c)(2)(A)*.

Defendants also challenge the sufficiency of the evidence for the conspiracy conviction, arguing that there was insufficient evidence to show an agreement between Thompson and any one of the other Defendants, or that any of the Defendants intended to violate the mail fraud statute or the CWA. When proving conspiracy,

> "[a]n express agreement is not required; a tacit, mutual agreement with common

> purpose, design, and understanding will suffice." Because secrecy is the norm, each element may be established by circumstantial evidence.[110]

The circumstantial evidence showed that Thompson agreed to the conspiracy, participated in overt acts in furtherance of the conspiracy, and that he had knowledge of the unlawful objectives of the conspiracy. The evidence also was sufficient to support a finding that Defendants intended to commit mail fraud or to violate the CWA. The Government presented evidence that Thompson attended meetings about the septic system designs with MDH and a "representative" of Lucas.[111] The MDH informed Thompson in letters that many of the septic systems he had certified were illegal and that he had certified septic systems on sites where the MDH had rejected the installation of septic systems. The MDH sent a letter to Lucas informing him that the MDH had rescinded many of its former recommendations of septic systems, and an MDH employee met with Wrigley to explain why the MDH could not recommend underground septic systems for the property. After MDH brought legal action against Thompson for illegally approving wastewater disposal systems at a non-

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[110] *United States v. Farias,* 469 F.3d 393, 398 (5th Cir.) (quoting *United States v. Infante,* 404 F.3d 376, 385 (5th Cir. 2005)), *cert. denied,* 127 S. Ct. 1502 (2007).

[111] Maddox testified that Mr. Thompson requested a meeting with her "to discuss the regulations" regarding septic systems in saturated soils and that Tommy Brodnax attended the meeting and "said he was there on behalf of Mr. Lucas and his development in Vancleave." She testified that "a couple weeks later, Tommy Brodnax and M.E. Thompson requested another meeting" with her.

BHA site, Wrigley told the MDH to stop interfering with Thompson's certifications.[112] The MDH also sent letters to Thompson warning him that he was illegally installing systems. The Government presented evidence that Thompson ignored the MDH's warnings and certified systems to allow lot sales to move forward.[113] The Government also presented evidence that Thompson did not inspect many of the systems that he certified and infrequently supervised installation. A reasonable jury could have determined beyond a reasonable doubt that Thompson, Lucas, and Wrigley conspired to profit from the sale of lots that were not habitable and to violate the CWA.

Thompson, Lucas, and Wrigley also challenge the court's jury instructions on conspiracy, alleging that the court erred in refusing to instruct the jury on unanimity and that the Government also requested a unanimity instruction, which the court failed to give. The district court viewed the conspiracy claim as a single conspiracy to commit several offenses, instructing the jury to find

> that the defendant and at least one other person made an agreement to commit at least one of the offenses charged in the

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[112] Jim Weston, branch director of the division of on site wastewater at MDH, testified that Wrigley "picked [him] up, and she [rode] him around Ocean Springs" and told him that "she felt that Mr. Thompson was doing a very good job for them out there. As far as she knew, that he knew more about it than we did. And that we should be ashamed of ourselves for having him arrested."

[113] Defendants presented evidence that Thomspon disagreed with the MDH's standards for interpreting soil charts and identifying saturated soils, arguing that his alleged non-compliance was a result of this disagreement.

> indictment. That is, the crime of mail fraud or to knowingly violate Section 404 of the Clean Water Act or to knowingly violate Section 402 of the Clean Water Act as charged in the indictment.

Defendants allege that these instructions created a "genuine risk that the jury [would be confused] or that a conviction [might] occur as the result of different jurors concluding that a defendant committed different acts" and that the court should have instructed on unanimity for this charge. The district court did not abuse its discretion in refusing to do so. The instructions did not risk confusing the jury, and they reasonably instructed the jury that it must find that Defendants *agreed*[114] to commit "at least one of the offenses" to convict for conspiracy, suggesting that the jurors had to concur on the specific offense -- or the several offenses -- that Defendants agreed to commit.

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[114] *See United States v. Dillman,* 15 F.3d 384, 391-92 (5th Cir. 1994) (citations omitted) ("The appellants' argument fails because it is based on a fundamental misunderstanding of the crux of a conspiracy charge under 18 U.S.C. § 371: The defendant's voluntary agreement with another or others to commit an offense against or to defraud the United States. It does not matter that a single conspiracy was comprised of several objects to which the defendant did not specifically agree to accomplish, if those acts were reasonably foreseeable. Once the defendant had joined the agreement, the acts of the other conspirators became his acts irrespective of whether he physically participated in those particular acts or expressly agreed to the various specific objectives that constituted the respective stages of the overarching conspiracy. When twelve jurors believe beyond a reasonable doubt that the defendant under consideration agreed to achieve an ultimate criminal purpose against the United States, all jurors need not agree on which particular offenses that defendant intended personally to commit as long as there is but one conspiracy that encompasses the particular offenses charged.").

Finally, Defendants argue that the "District Court erred in failing to instruct the jury that if the objective of the conspiracy was legal, Defendants could not be convicted of conspiracy." Although Defendants' proffered instruction was an accurate statement of the law, the court's instructions substantially covered the alternative language. They required that, in order to find conspiracy, the jury must find that Defendants agreed to commit the "*crime* of mail fraud or to ***knowingly violate*** Section 404 of the Clean Water Act or to ***knowingly violate*** Section 402 of the Clean Water Act as charged in the indictment," thus indicating that the jury must find that Defendants agreed to do something illegal.

VIII

All of the Defendants contest several evidentiary rulings of the court.[115] At trial, the Government presented Phillip Johnson, a lot owner and worker at BHA, as a witness. The Government provided Defendants with "The Statements of Phillip Johnson" prior to trial but substantially redacted the statements by cutting out large paragraphs and repasting the material. The redacted portions included allegations that Robert Lucas had bribed local officials to further his business on BHA. Defendants were unaware of the redacted bribery allegations until Johnson mentioned them in direct examination. For the first time at oral argument, the Government claimed that it had not planned to elicit the bribery testimony and that Johnson's statements came as a surprise.

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[115] Lucas, BHA, Inc., Consolidated Investments, Inc., and Thompson adopted Wrigley's evidentiary arguments.

Regardless of whether or not the Government anticipated that Johnson would testify about bribery, its behavior was wrong. By redacting the statements in a non-obvious manner and failing to reveal material that would arise at trial, the Government shortened Defendants' time to prepare an adequate defense.

When improper evidence is introduced to the jury but a defendant's subsequent motion for mistrial is denied, we review the denial for abuse of discretion[116] and, if we find error, we apply harmless error review.[117] Further,

> New trial is required only when, after a review of the entire record, it appears that there is a significant possibility that the prejudicial evidence had a substantial impact on the jury verdict. We give great weight to the trial court's assessment of the prejudicial effect of the evidence, and prejudice may be rendered harmless by a curative instruction.[118]

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[116] *United States v. Valles,* 484 F.3d 745, 756 (5th Cir. 2007) (citing *United States v. Dupre,* 117 F.3d 810, 823 (5th Cir. 1997)), *cert. denied,* 127 S. Ct. 3025 (2007), *and petition for cert. filed* (Jul. 6, 2007) (No. 07-8373), *and cert. denied,* 128 S. Ct. 238 (2007).

[117] *See, e.g., Dorsey v. Quarterman,* 494 F.3d 527, 531 (5th Cir. 2007) (jurors saw non-redacted version of a redacted transcript that had been introduced at trial; defendant moved for mistrial; court denied motion; we reviewed for harmless error and found that any error was harmless), *petition for cert. filed* (Oct. 27, 2007) (No. 07-7371).

[118] *Valles,* 484 F.3d at 756.

The FBI had interviewed Johnson and had prepared a summary of the interviews. The Government provided a redacted version of this summary to defendants before trial, as required by *Rule 16* for organizational defendants.[119] The redacted version of the FBI summary omitted the following language:

> While employed at BHA he [Johnson] knew several other men who worked for LUCAS [followed by the names of employees]. He believes that most of these employees are still around. DANNY ANDERSON moved to Newberry, South Carolina.
>
> JOHNSON heard rumors from other employees that LUCAS paid off county officials in order to develop land he was not supposed to, build roads in an inferior manner, and get approval for septic tanks in areas where they would clearly not function correctly. JOHNSON always assumed that these were just rumors and that LUCAS was doing things correctly.
>
> However, one day he saw something that troubled him. Around that spring of 1998 he was repairing a piece of equipment on the job site. LUCAS pulled up in his car, then two males pulled up in a Ford Crown Victoria with county tags displayed on it. LUCAS handed each of the men a brown envelope. They stood at the back of the car and spoke. Then TOMMY BROADNAX [sic], a county supervisor

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[119] FED. R. CRIM. P. 16(a)(1)(C).

> pulled up. BROADNAX [sic] also received a brown envelope from Lucas . . . All four men then got in the county car and drove off. They were only gone for a few minutes. When they returned BROADNAX [sic] and LUCAS got out and got in LUCAS' car and drove towards the BHA office. The two men got in the county car and drove away.
>
> BROADNAX [sic] would frequently come out to the area and ride around with LUCAS. Other employees told him that BROADNAX leased a dump truck to BHA. The dump truck was very seldom used but, LUCAS paid for it on a monthly bases [sic] whether or not it was utilized.

Johnson, in response to a Government question about a meeting that Johnson had with Brodnax, testified that Lucas "pulled out a couple of envelopes and gave one to Tommy," and that there was "some greenback" in the envelope. This testimony was a surprise to both the court and Defendants. This surprise introduction of the bribery evidence was unfair but did not rise to a deprivation of Defendants' due process rights.

After Johnson testified about bribery, the court changed its prior ruling that Defendants could not introduce Johnson's criminal background, allowing them to extensively cross-examine him about his prior convictions and arrests. The court also gave curative instructions and reminded the jury about the testimony on Johnson's prior convictions, stating,

> You have been told that the witness Phillip Johnson was previously convicted of

> several felony offenses. A conviction is a factor you may consider in deciding whether to believe that witness, but it does not necessarily destroy the witness' credibility. It has been brought to your attention only because you may wish to consider it when you decide whether your believe the witness' testimony. * * * You are here to decide whether the government has proved beyond a reasonable doubt that the defendants are guilty of the crimes charged. The defendants are not on trial for any other act, conduct or offense not alleged in the indictment.

Although Defendants argue that despite these measures, the bribery evidence tainted the entire case and "moved the direction of the trial from a mail fraud, wetlands, habitability, Clean Water Act case into a public bribery case," the evidence from the record does not suggest that the case was tainted to this degree or that it led the jury to settle upon a verdict that it would not have otherwise reached. The Government presented evidence of Defendants' continued and knowing violations of the law, despite several agencies' orders to stop. The evidence in the case did not focus unduly on bribery but rather on the hydrology of the area, the problems that residents faced as a result of septic systems installed in wet areas, and Defendants' methods for advertising, selling, and receiving payments for the lots. The Government did not mention bribery in its closing argument; its only discussion of Phillip Johnson referred to his warnings to Lucas that the land was wet, his complaints about the failed septic system on his lot, and his road construction work as an employee for Lucas.

Defendants also argue that the Government, in providing Johnson's redacted statements to Defendants prior to trial, failed to properly disclose *Rule 16(a)(1)(C)* evidence of statements by an organization's representative; failed to comply with the court's discovery order in violation of *Rule 26*; violated the Jencks Act; and introduced improper *404(b)* character evidence of "bad acts." The Government did not violate the Jencks Act because it provided an unredacted version of the statements after Johnson testified. Even assuming that the Government violated the court's discovery order and *Rule 16(a)(1)(C)* by failing to provide a full, unredacted version of Johnson's statements prior to trial, we are not persuaded that the introduction of the testimony and the Government's failure to disclose the nature of that testimony in advance rose to the level of reversible error.[120]

The day after Johnson had mentioned the bribery incident, the court advised Johnson to "make a conscious effort to try to limit [his] responses to the questions so that [he would be] responsive to the question and [not] give us more . . . more of a colorful comments [sic] and colorful testimony than is really necessary for this jury to resolve the issues." The court also allowed the Defendants to extensively cross examine Johnson and gave the jury cautionary instructions, as discussed above.

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[120] *See United States v. Ramirez, 174 F.3d 584, 587 (5th Cir. 1999)* ("Even when a [Jencks Act] violation is found, the failure to produce prior statements is subject to a harmless error analysis."); *United States v. Gonzalez, 661 F.2d 488, 494 (5th Cir. 1981)* ("Assuming that th[e] failure to disclose [under *16(a)(1)(C)*] was the government's error, it is not cause to reverse unless prejudicial to the substantial rights of the accused.").

Finally, the district court did not abuse its discretion in refusing to strike Johnson's testimony and ruling that Johnson's testimony was evidence of overt acts and not *Rule 404(b)* character evidence, finding,

> The government's theory of the conspiracy from the beginning has included the allegation that Mr. Brodnax was at a minimum helpful in obtaining favorable zoning decisions and resolutions from the board of supervisors, exerting influence upon the health department in an overall effort to assist Mr. Lucas.

We have held that "all the government need do [to show that *Rule 404(b)* does not apply] is suggest a logical hypothesis of the relevance of the evidence for a purpose other than to demonstrate [the defendant's] propensity to act in a particular manner."[121] In its opening arguments, the Government stated:

> [T]he Jackson County board of supervisors granted Mr. Lucas variance after variance, freeing him from any platting requirement. . . . These variances from the Jackson County board of supervisors were an additional benefit to Mr. Lucas and Ms. Wrigley. . . . The variances freed them from the scrutiny of the planning department.

The Government then introduced evidence of the unusual number of variances granted to Lucas, including the testimony of Johnson, who worked for Lucas and witnessed his interactions with the board.

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[121] *United States v. Kraut,* 66 F.3d 1420, 1431 (5th Cir. 1995).

Defendant Thompson argues that the court abused its discretion in denying his motion to sever following the introduction of Johnson's surprise testimony. We review a district court's denial of a motion for severance for an abuse of discretion[122] and reverse only if "there is clear prejudice to the defendant"[123] as a result of the denial. Defendants argue that "Thompson suffered extreme prejudice from the joint trial with Robert Lucas . . . [because] a new but uncharged crime c[a]me before the jury (bribery) which he had no opportunity to defend since he was not aware of any such purported act and the Government concealed the prejudicial testimony in discovery." They further argue, "The prejudice suffered by Defendant Thompson is patently compelling and the court could do nothing to mitigate same, as it was impossible to mitigate the effect on the jury or give the defendant sufficient time to prepare a defense . . ."

Thompson cites the court's remarks regarding its surprise over the introduction of Johnson's bribery evidence. A court's surprise over the introduction of evidence does not demonstrate clear prejudice, and Thompson fails to indicate how he was otherwise prejudiced.

Defendants also sought leave to depose a witness, Bobby Strickland, and present his deposition at trial to counter the evidence introduced by Johnson. The district court denied the motion. Mr. Strickland was unable to testify at trial due to "distance, surgery, and death in his family." Defendants allege that Strickland would have countered Johnson's claims about his relationship with Strickland.

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[122] *United States v. Hickerson,* 489 F.3d 742, 746 (5th Cir. 2007) (citing *United States v. McCarter,* 316 F.3d 536, 538 (5th Cir. 2002)), *cert. denied,* 128 S. Ct. 521 (2007).

[123] *Id.* (quoting *United States v. Holloway,* 1 F.3d 307, 310 (5th Cir. 1993)).

District courts have "broad discretion" to grant or refuse a Rule 15(a) motion, and they "should review these motions on a case-by-case basis, examining whether the particular characteristics of each case constitute 'exceptional circumstances.'"[124] "The words 'exceptional circumstances' bespeak that only in extraordinary cases will depositions be compelled."[125] Such extraordinary circumstances include, for example, situations where a potential deponent would not likely be able to return to the United States.[126] Even if extraordinary circumstances are present, the proposed deposition must be "material,"[127] and we subject any error caused by denial of a motion for deposition to harmless error review.[128] Where "even assuming the greatest benefit to the defendants from [the proposed deponent's testimony, that testimony still could not have exculpated [the defendant],"[129] we find harmless error.

Although Strickland's testimony would have been "material" in the sense that it may have discredited some of Johnson's claims, the circumstances of "distance, surgery, and death in his family" are not extraordinary. Even if they were, Strickland's testimony would not have necessarily helped to exculpate Defendants from their direct charges, as bribery was not included in the charges but was evidence relevant to the conspiracy, of which there was substantial evidence unrelated to bribery, as we have described.

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[124] *Dillman,* 15 F.3d at 389 (quoting *United States v. Bello,* 532 F.2d 422, 423 (5th Cir. 1976)).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

Finally, Defendants argue that the Government committed many unforgivable errors throughout the trial by making multiple speaking objections, mentioning in front of the jury that Defendants had filed a motion to dismiss, suggesting that Defendants had the burden of proof,[130] alluding to the fact that Thompson had not testified,[131] and asking "prejudicial questions" with "no good faith basis."[132] The court instructed the jury that Defendants had no burden of proof and that statements by lawyers are not evidence, stating,

> [t]he law does not require a defendant to prove his innocence or to produce any evidence at all and no inference whatever may be drawn from the election of a defendant not to testify. The government has the burden of proving each of the defendants guilty beyond a reasonable

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[130] The prosecution asked one of Defendants' witnesses on cross, "And you're asking the jury to rely on this beyond a reasonable doubt, and there are no data points here at all on it, right?"

[131] The prosecution stated, in referring to defense counsel's cross examination, "Your honor, he's just simply testifying. If they want to put Mr. Thompson on to say what happened. But he's testifying. I object to it."

[132] Claiming, for example, that "the Government elicited testimony about the drinking water that the Government knew to be baseless, but which was highly prejudicial to Appellants."

> doubt; and, if it fails to do so, you must acquit that defendant. * * * Remember that any statements, objections or arguments made by the lawyers are not evidence in the case.

After the Government alluded to Mr. Thompson's decision not to testify and Mr. Thompson's attorney made a motion for mistrial, the court also gave a cautionary instruction, stating,

> the government's attorney made a comment during an objection which may have been taken by you as an indication that Mr. M.E. Thompson would or should testify in this case. First, I want to remind you the defendants are presumed innocent until proven guilty. The burden of proof is on the government until the very end of the case. The defendants have no burden to prove their innocence or to present any evidence or to testify. Since the defendants have the right to remain silent, the law prohibits you in arriving at your verdict from considering that the defendants may not have testified. I specifically instruct you that Mr. Thompson has absolutely no duty to testify. And you are not to hold it against him or to consider that in any way as to whether or not he is guilty or not guilty of the crimes that are charged against him in the indictment. He has an absolute right under the Constitution of the United States not to testify. And that is not to be held against him by the jury. And I want you to keep that in mind at all times. I don't know

> whether Mr. Thompson will testify or not. However, any remarks counsel for the government may have made that might lead you to expect Mr. Thompson to testify should be put out of your minds entirely.

Defendants understandably take issue with the tactics of the Government, but none of their examples suggest that the tactics were so out of line that we must find that the district court abused its discretion in refusing to grant a mistrial. That does not mean that we approve of this want of professionalism.

IX

The court, following the guidelines, sentenced Lucas to 108 months' imprisonment and three years' supervised release and fined him $15,000. It sentenced both Wrigley and Thompson to 87-month sentences with three years' supervised release and assessed $15,000 in fines against each of them. It fined BHA, Inc. $4.8 million and Consolidated Investments $500,000, and assessed $1,407,400 in restitution against each Defendant.[133] Defendants argue that the restitution is based on an erroneous calculation of loss and the number of victims. Defendants also contest the court's refusal to grant downward departures for acceptance of responsibility.

"'Although the determination of loss is a factual finding reviewed for clear error, the court's choice of the method by which losses are determined involves an application of the sentencing guidelines, which is reviewed de novo.'"[134] Defendants argue that the district court erred in calculating a loss range between $1 and 2.5 million based on the eighteen lots in the mail fraud counts and in calculating the number of victims. They assert that even if the loss figure were correct, the court should have authorized a lower loss figure because "the offense level determined under this guideline substantially overstated the seriousness of the offense." Defendants also argue that the court erred in identifying 67 victims when calculating loss, as only 21 residents and former residents testified, and MDH evaluations indicated that 25 septic systems malfunctioned.

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[133] The court also sentenced BHA, Inc. and Consolidated Investments to 5 years' probation and made special assessments of $7,600 and $400 against BHA and Consolidated Investments, respectively.

The court properly used the sales price of the lots to calculate the amount of money that Defendants intended to receive from the fraud -- i.e., the loss to the victims of the fraud. This is an acceptable measure under *United States v. Pennell*.[135] The court also correctly determined the number of victims by identifying the individuals included in the indictment.[136] The number of victims should not be limited to those who testified at trial or to the MDH evaluations that showed that 25 septic systems malfunctioned, as Defendants argue. Defendants were convicted for a fraudulent scheme that affected many lot buyers, not just those that Mississippi determined to have been affected by septic system problems.

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[134] *Harms,* 442 F.3d at 379 (quoting *United States v. Deavours,* 219 F.3d 400, 402 (5th Cir. 2000)).

[135] 409 F.3d 240, 244 (5th Cir. 2005).

[136] *United States v. Cothran, 302 F.3d 279, 290 (5th Cir. 2002)* ("under our precedent, the district court could award restitution to all of the victims of the broader scheme").

Finally, Defendants argue that the court should have granted a downward departure from the sentencing guidelines because they accepted responsibility for their acts, arguing that Lucas did not challenge the underlying facts presented by the Government but rather disputed the constitutionality of the CWA. We review a court's interpretation of the guidelines *de novo* and its findings of fact in the sentencing hearing for clear error.[137] We "lack[] jurisdiction to review a downward-departure denial unless . . . the district court held a mistaken belief that the Guidelines do not give it the authority to depart."[138] Appellants produce no evidence that the court was unaware of its authority.

AFFIRMED.

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[137] *United States v. Austin,* 479 F.3d 363, 367 (5th Cir. 2007).

[138] *United States v. Sam,* 467 F.3d 857, 861 (5th Cir. 2006).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-60289

UNITED STATES)
OF AMERICA)
) Plaintiff-Appellee
)
v.)
)
ROBERT J LUCAS, JR;)
BIG HILL ACRES INC;)
CONSOLIDATED)
INVESTMENTS INC;)
ROBBIE)
LUCAS WRIGLEY;)
M E THOMPSON JR) Defendants-Appellants

Appeals from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 4, 2008)

(Opinion 2/1/08, 5 Cir. ____, ____ F.3d ____)

Before HIGGINBOTHAM, SMITH and OWEN, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Patrick Higginbotham
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES OF	§	
AMERICA	§	
	§	
v.	§	1:04CR60GuRo
	§	
ROBERT J. LUCAS, JR.	§	
ROBBIE LUCAS	§	
WRIGLEY	§	
M.E. THOMPSON, JR.	§	
BIG HILL ACRES, INC.	§	
CONSOLIDATED	§	
INVESTMENTS, INC.	§	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS CLEAN WATER ACT [COUNTS 30-41] FOR FAILING TO CHARGE AN OFFENSE

BEFORE THIS COURT is a Motion to Dismiss Clean Water Act Counts [30-41] For Failing to Charge an Offense filed September 23, 2004, by Robert J. Lucas, Big Hill Acres, Inc. and Consolidated Investments, Inc.[1] Defendants move the Court to dismiss Counts 30-41 of the Indictment on the grounds that the Government has failed to adequately charge the Defendants with violations of the Clean Water Act. The Defendants contend that because the Clean Water Act does not expressly require individual onsite septic permits, the Government cannot charge Defendants with failure to obtain National Pollutant Discharge Elimination System permits.

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[1] Defendants M.E. Thompson and Robbie Lucas Wrigley filed a notice of joinder in this motion on September 24, 2004.

Defendants were, by indictment returned on June 9, 2004, and superceding indictment returned on November 5, 2004, charged with violation of the Clean Water Act, 18 U.S.C. § 1319(c)(2)(A). The record before the Court demonstrates that, even after consideration of the parties supplemental authorities, there are disputed questions of fact that require resolution by a properly instructed jury, including whether the named Defendants were responsible for or exempt from obtaining permits for discharging pollutants and whether pollutants were discharged from a point source directly into wetlands that are waters of the United States. As such, the Defendants' Motion should be denied.

IT IS ORDERED AND ADJUDGED, that the Motion to Dismiss Clean Water Act Counts [30-41] For Failing to Charge an Offense filed September 23, 2004, [571-] should be and is hereby DENIED.

SO ORDERED AND ADJUDGED this the 7th day of January 2005.

S/ Louis Guirola, Jr.
LOUIS GUIROLA, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION

UNITED STATES OF	§	
AMERICA	§	
	§	
v.	§	1:04CR60GuRo
	§	
ROBERT J. LUCAS, JR.	§	
ROBBIE LUCAS	§	
WRIGLEY	§	
M.E. THOMPSON, JR.	§	
BIG HILL ACRES, INC.	§	
CONSOLIDATED	§	
INVESTMENTS, INC.	§	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS CLEAN WATER ACT [COUNTS 20-41] FOR VAGUENESS

BEFORE THIS COURT is the Motion to Dismiss Clean Water Act Counts [20-41] For Vagueness filed September 23, 2004, by Robert J. Lucas, Big Hill Acres, Inc. and Consolidated Investments, Inc. [1] Defendants move the Court to dismiss Counts 20-41 of the Indictment on the grounds of lenity and due process of law. On December 13, 2004, the Court heard oral arguments on these motions.

In the instant motion, Defendants assert that the Clean Water Act fails to provide adequate notice.

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[1] Defendants M.E. Thompson and Robbie Lucas Wrigley filed a notice of joinder in this motion on September 24, 2004.

Specifically, Defendants contend that the Clean Water Act is vague in its general application and in both notice and the discretionary powers under the act. Defendants move the Court to dismiss the indictment by declaring the Clean Water Act unconstitutional under the Fourteenth Amendment.

In the absence of clear authority from the United States Supreme Court or the Fifth Circuit Court of Appeals. this Court declines taking declare that the Clean Water Act is unconstitutional. The Court finds that Defendants' Motion is not well taken and should be denied.

IT IS THEREFORE ORDERED AND ADJUDGED, that the Motion to Dismiss Clean Water Act Counts [20-41] For Vagueness filed September 23, 2004, [59-1] should be and is hereby DENIED.

SO ORDERED AND ADJUDGED, this the 29th day of December, 2004.

S/ Louis Guirola, Jr.
LOUIS GUIROLA, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION

UNITED STATES OF §
AMERICA §
§
v. § 1:04CR60GuRo
§
ROBERT J. LUCAS, JR. §
ROBBIE LUCAS §
WRIGLEY §
M.E. THOMPSON, JR. §
BIG HILL ACRES, INC. §
CONSOLIDATED §
INVESTMENTS, INC. §

ORDER DENYING DEFENDANTS' MOTION TO DISMISS CLEAN WATER ACT [COUNTS 20-41] FOR LACK OF JURISDICTION

BEFORE THIS COURT is the Motion to Dismiss Clean Water Act Counts [20-41] For Lack of Jurisdiction filed September 23, 2004, by Robert J. Lucas, Big Hill Acres, Inc. and Consolidated Investments, Inc. [1] Defendants move the Court to dismiss Counts 20-41 of the Indictment on the grounds that under the Clean Water Act, specifically §§ 402 and 404, the Government lacks jurisdiction to prosecute these Defendants. For the reasons stated herein and on the record, the Court finds that Defendants' Motion is not well taken and should be denied.

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[1] Defendants M.E. Thompson and Robbie Lucas Wrigley filed a notice of joinder in this motion on September 24, 2004.

Defendants were charged with violation of the Clean Water Act pursuant to 18 U.S.C. § 1319(c)(2)(A). Twenty-two counts of the indictment are based on alleged violations of the Clean Water Act. Counts 20 through 29 allege the defendants filled wetlands without a permit from the Corps of Engineers in violation of Section 404 of the Clean Water Act. Counts 30 to 41 charge the defendants with discharging sewage into the wetlands without a National Pollutant Discharge Elimination System ["NPDES"] permit from the EPA in violation of Section 402 of the Clean Water Act.

Defendants contend that the entire indictment is premised on the Clean Water Act which is not applicable to the Big Hill Acres development. According to the Defendants, for Clean Water Act jurisdiction to attach, the wetlands at issue must themselves be navigable or must be actually adjacent to a navigable body of water. Defendants contend that the indictment fails to allege that the wetlands on Big Hill Acres are navigable. Further, Defendants contend that the indictment fails to allege that Big Hill Acres is adjacent to a navigable body of water. The instant Motion asserts that the Government is without jurisdiction to prosecute the Defendants under the Clean Water Act.

The Court has thoroughly considered the evidence before it, including the pleadings on file, the briefs and arguments of counsel, and the relevant legal authorities. The Court finds that there is a valid indictment in this case which adequately places the defendants on notice of the alleged violations of the provisions of the Clean Water Act.

IT IS THEREFORE ORDERED AND ADJUDGED, that the Motion to Dismiss Clean Water Act Counts [20-41] For Lack of Jurisdiction filed September 23, 2004, [55-1] should be and is hereby DENIED.

SO ORDERED AND ADJUDGED, this the 29th day of December, 2004.

S/ Louis Guirola, Jr.
LOUIS GUIROLA, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION

UNITED STATES OF AMERICA	§ §	
	§	
v.	§	1:04CR60GuRo
	§	
ROBERT J. LUCAS, JR.	§	
ROBBIE LUCAS WRIGLEY	§ §	
M.E. THOMPSON, JR.	§	
BIG HILL ACRES, INC.	§	
CONSOLIDATED INVESTMENTS, INC.	§ §	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS CLEAN WATER ACT [COUNTS 27-41] FOR FAILURE TO ESTABLISH INTENT

BEFORE THIS COURT is the Motion to Dismiss Clean Water Act Counts [27-41] For Failure to Establish Intent filed September 23, 2004, by Robert J. Lucas, Big Hill Acres, Inc. and Consolidated Investments, Inc.[1] Defendants move the Court to dismiss Counts 27-41 of the Indictment on the grounds that the named Defendants did not possess the requisite intent or *mens rea* to commit a criminal act in violation of the Clean Water Act. On December 13, 2004, the Court heard oral arguments on these motions. For the reasons stated on the record, the Court finds that Defendants' Motion is not well taken and should be denied.

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[1] Defendants M.E. Thompson and Robbie Lucas Wrigley filed a notice of joinder in this motion on September 24, 2004.

IT IS THERFORE ORDERED AND ADJUDGED, that the Motion to Dismiss Clean Water Act Counts [27-41] For Failure to Establish Intent filed September 23, 2004, [53-1] should be and is hereby DENIED.

SO ORDERED AND ADJUDGED, this the 29th day of December, 2004.

S/ Louis Guirola, Jr.
LOUIS GUIROLA, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

UNITED STATES) Plaintiffs
OF AMERICA)
)
V.) CIVIL ACTION NO.
) 1:04cr60GuRo
)
ROBERT J. LUCAS,)
JR., ET AL) Defendants

COURT REPORTER'S TRANSCRIPT OF TRIAL

BEFORE HONORABLE LOUIS GUIROLA, JR.
UNITED STATES DISTRICT COURT JUDGE
– and a jury –
January 10, 2005
Gulfport, Mississippi

DAILY COPY
NOT PROOFREAD

APPEARANCES:

JEREMY F. KORZENIK, ESQUIRE
DEBORAH HARRIS, ESQUIRE
U.S. Department of Justice
P.O. Box 23985
Washington, DC 20026-3985

JAY T. GOLDEN, ESQUIRE
U.S. Attorney's Office
1575 20th Avenue
Gulfport, MS 39501

APPEARANCES (CONT'D):

Representing the Government

WILLIAM LEE GUICE, III, ESQUIRE
Rushing & Guice
P.O. Box 1925
Biloxi, MS 39533-1925

PHILLIP A. WITTMAN, ESQUIRE
DARIA B. DIAZ, ESQUIRE
PAUL MASINTER, ESQUIRE
Stone, Pigman, Walther
& Wittman, LLC
546 Carondelet St.
New Orleans, LA 70130-3588

Representing the Defendants,
Robert J. Lucas, Jr., Big Hill Acres, Inc. and
Consolidated Investments, Inc.

LESLIE D. HOLLEMAN, ESQUIRE
TIMOTHY C. HOLLEMAN, ESQUIRE
Boyce Holleman, P.A.
P.O. Drawer 1030
Gulfport, MS 39502-1030

Representing the Defendant,
Robbie Lucas Wrigley

WILBUR F. HOLDER, II, ESQUIRE
20048-A Pineville Road
Long Beach, MS 39560

Representing M. E. Thompson, Jr.

ALSO PRESENT:	David McLeod, EPA
	Robert J. Lucas, Defendant
	M.E. Thompson, Defendant
	Robbie Lucas Wrigley, Defendant

COURT REPORTER:
Margaret W. Seal, RMR, CRR
701 N. Main Street, Room 253
Hattiesburg, MS 39401
(601) 583-4383

(February 3, 2005, 1:36 p.m.)

(Off the record discussion)

THE COURT: All right. Has the government had an opportunity to review the defendants' motion for judgment of acquittal under Rule 29 and the supporting memoranda?

MS. HARRIS: Yes, Your Honor, we have.

THE COURT: All right. I'll state what is obvious, and that is that Rule 29 motions for judgment of acquittal require the Court to consider all of the government's evidence in the light most favorable to the government. That means that the Court grants all reasonable inferences since the jury is permitted to draw conclusions and is permitted to deduce or to make deductions based on the evidence that they hear. Thus, that's where we get the language in the light most favorable to the government.

The Court has to consider based upon that standard whether there is evidence from which a jury can conclude that the government has sustained their burden, which is beyond a reasonable doubt. And I have to say that the defendants' motion for judgment of acquittal is quite succinct. It's to the point. And it seems to frame the issues.

Now, I do have some -- let me ask it this way. In addition to the motion and the memoranda, do the defendants feel any necessity for any further argument?

MR. WITTMAN: Your Honor, we tried to put everything we could into this memorandum. And Ms. Diaz worked very late last night trying to even get transcript references. All I want to add, Your Honor, is that in addition to the transcript references we provided the Court, those are really illustrative. There are obviously many other transcript references we haven't had time to pull together and give to Your Honor. But I believe our memorandum captures the essence of why we believe a judgment of acquittal is appropriate.

THE COURT: All right. Very well. I think then -- and Mr. Holder, I'll invite your comments if you have any additional at this point.

MR. HOLDER: No, Your Honor. I think that --

THE REPORTER: I can't -- I'm sorry. I can't hear you.

MR. HOLDER: I'm sorry. I think that pretty much summarizes all the defendants' position.

THE COURT: And Mr. Holleman, I'll extend the same courtesy to you.

MR. TIMOTHY HOLLEMAN: Yes, Your Honor. We join -- we move also on the same grounds.

THE COURT: All right. Then I think it -- what I will do is I will move then to the government. Is there anything that the government wishes to state into the record in response to the motion and to the memoranda?

MS. HARRIS: Your Honor --

THE COURT: And please forgive me if I ask you to either slow down or repeat something. I'm not nearly as quick of finger or of wit as the court reporter may be. And I might need for you to go back over something for me. And I may in all likelihood also want to ask you some questions.

MS. HARRIS: Okay. Then I'll --

THE COURT: Why don't you make your argument, and then I'll ask questions if I have any.

MS. HARRIS: Well, what I was going to do -- and this is only if the Court thinks it's necessary. I was gonna go count by count and put into the record what we believe we have in evidence to prove each count.

THE COURT: I think that that type of -- that kind of detail is unnecessary.

MS. HARRIS: Okay.

THE COURT: I heard the evidence, and I heard the testimony. There's some portions of it I may have some questions about. But by and large, I did hear it and I did try to take notes as best I could as to what the evidence was. I'm more interested in your legal arguments at this point.

MS. HARRIS: Well, our legal arguments -- I'll begin with the jurisdictional argument. We believe that we've provided more than enough evidence to show beyond a reasonable doubt that these are jurisdictional wetlands. And we've done this through the testimony and exhibits of Peter Stokely, who through the use of aerials, corroborative resources such as the national wetlands inventory, the hydric soils maps and MARIS waterways maps and ground-truthing established that there was connectivity between the wetlands, which everybody concedes exist on Big Hill Acres, and the Section 10 waters.

We believe that we've shown in two different ways that these wetlands are jurisdictional. The first is our theory from -- that stems from the Riverside Bayview case that Big Hill Acres is part of a wetland system that extends all the way to the Section 10 waters. The Section 10 waters being by definition navigable-in-fact.

We're in no way conceding that there are not navigable-in-fact waterways north of those Section 10 waters, but we believe we've established a wetland system all the way to those Section 10 lines.

We also believe that we've --

THE COURT: What's that on your finger?

MS. HARRIS: It's a Band-Aid.

THE COURT: Is that a Band-Aid?

MS. HARRIS: And it's got Elmo on it.

THE COURT: All right. As you were gesturing with your hands, I found it just a tad distracting. But now that I know what it is, I'll feel better.

MR. TIMOTHY HOLLEMAN: I thought she was doing it to me, Your Honor.

THE COURT: Go ahead. I apologize.

MS. HARRIS: Okay. The second way that we believe we've established jurisdictional wetlands is by showing that we have wetlands that are adjacent to tributaries of navigable-in-fact waterways.

Other testimony and exhibits in support of this, in addition to Peter Stokely, that was the testimony of Mike Wylie, who again used aerials, the corroborative resources of the NWI, the hydric soils maps and the MARIS waterways. He talked of flyovers that he did in an airplane, on and off site wetland determinations and walking and boating the connections from Big Hill Acres in five different drain ways to the Section 10 waters.

The testimony of Delaney Johnson, who not only did on site determinations but had worked for several years putting together the hydric soils survey for Jackson County and was familiar with that area.

The testimony of Palmer Hough from the EPA, who was doing the work with D.R. Sanders back when the delineations were being done. And with his colleague, Lee Pelej, who had 25 years experience doing ground-truthing and following the connections to the Section 10 waters. The report of D.R. Sanders, which has been admitted into evidence and which inside of the report states that these are jurisdictional waters. We also have put into evidence letters from Jimmy Palmer that state that these are jurisdictional wetlands.

In addition, the testimony of Troy Ephriam and Frank Hubiak from the Corps of Engineers. Frank Hubiak indicated that -- this is part of what he does every day. He did a desk top jurisdictional assessment. And both he and Troy Ephriam made assertions to Lucas back in 1996 and 1999 that these were jurisdictional wetlands.

As far as evidence of the lack of a 404 permit and the lack of a 402 permit, that came in through all of our witnesses from EPA and the Corps of Engineers as well as the witnesses from DEQ.

I was gonna try to avoid going count by count. And while I'm shortcutting this, let me try to figure out where to go next. I believe that the first argument that the defense made was regarding the jurisdictional waters. So --

THE COURT: I think you've answered that --

MS. HARRIS: There has been -- as far as proof that septic tanks are point sources, I believe that that evidence clearly came in through the testimony of Jim Weston from the Department of Health who described in detail what a septic system is made of and that it includes discreet conveyances that channelize water. He talked about the pipes that come from the septic tank and the pipes that go into the field drain.

And that along with the testimony of all of our experts that the wetlands themselves are waters of the U.S., we believe that that was sufficient proof that these septic tanks are point sources because they are placed directly in waters of the U.S.

The evidence that the defendants are not operators of the septic systems, we believe that we've put on sufficient proof of that. I will remind the Court of testimony that came from Ralph Kennedy, an employee of Mr. Lucas. When we asked about repairs to these septic systems, he said Mr. Lucas is the owner of these septic systems and that he authorized these different repairs.

It also seems to be that the defendants have total access to all this property. We, of course, pled aiding and abetting. We've proved that. But they have total access to this property given all of the photographs you've seen of people's property while they still inhabit it, that the defense has taken. So I would say there seems to be no expectation of privacy out there and that we have shown that these are operators -- that the defendants are operators.

On the mail fraud counts, I do believe that there's been more than sufficient evidence that these lots were obtained through misrepresentations made on behalf of the defendants. The various victims who testified were misled into believing that they were gonna have this turnkey operation where they walk in and everything has been done according to code and done according to regulation. And that it turns out that things were, in fact, not done according to -- whether it was Mississippi state law or the Clean Water Act.

And everything that has come out tends to go to the conspiracy count. Starting with the meeting back in December -- December 20th of 1996 where instead of Mr. Lucas showing up, Tommy Brodnax came as his agent. And it went on from there with the sharing of information and this scheme that developed to install septic systems in lands where the health department had tried to shut it down.

Court's indulgence.

(Off the record discussion between government counsel)

MS. HARRIS: And unless the Court has specific questions about specific counts, then --

THE COURT: I do.

MS. HARRIS: Okay. Go ahead.

THE COURT: I do. Before I get to the specific counts, though, I want to be sure that I understand your jurisdictional theories. The first of those is that the Big Hill Acres comprises a smaller part of a larger wetlands ecosystem, which is adjacent to Section 10 waters. That's your first theory of jurisdictional wetlands.

And your second theory is that the Big Hill Acres, even if the Court were to determine that it's not one big wetlands but lots of little wetlands, that the Big

Hill Acres wetlands are adjacent to tributaries which ultimately flow into navigable waters.

MS. HARRIS: Navigable-in-fact waters, yes.

THE COURT: Right. All right. Now, let me ask you about some specific counts.

MS. HARRIS: Okay.

THE COURT: And I'll move very quickly to Count No. 24.

MS. HARRIS: Yes.

THE COURT: That is one of the counts in which the defendants are accused or charged with --

MS. HARRIS: A Section 404 violation by installing a septic system into wetlands on April 24th, 1999, on lot KK-2.

THE COURT: Right. All right. Can you point to or can you tell me where -- I don't remember -- and listen, juries are the ones that have to remember these facts. Not necessarily me. But I'm trying to remember the specific testimony that Big Hill Acres or one of these defendants or someone on behalf of one of these defendants actually installed a system.

MS. HARRIS: And the evidence would be -- the first evidence is in -- I believe it's Exhibit 205. It would be page 158 of that, which is the Wylie slide presentation. That's -- Wylie was on that lot and showed that there was a system installed into wetlands. In addition, we introduced into evidence a receipt from Bo Shields which showed that as an installation date.

THE COURT: All right. Well, that shows that Bo Shields installed it and that it was installed. What I'm looking for is: Where was the evidence or the testimony or the documentation that one of these defendants installed it?

MS. HARRIS: The rest of the testimony that goes to that lot, for which we did not call a property owner, is the design submitted by M.E. Thompson --

THE COURT: I'll give you that. They designed it.

MS. HARRIS: -- and the certification.

THE COURT: I'll give you that, too. They certified it. I guess what I'm looking at, Ms. Harris, is: Where is the evidence that one of these defendants scratched in the dirt, excavated and otherwise installed a system in wetlands in violation of Section 404?

MS. HARRIS: The evidence is through those documents that our co-conspirators designed the system, had it installed by Bo Shields --

THE COURT: That's my question then. I guess -- now we're zeroing in on it. Where is the evidence that any of these defendants told Bo Shields to install that system?

MS. HARRIS: Well, the evidence is the receipt itself of Bo Shields and the fact that Mr. Thompson then sent a letter certifying that the system was installed as designed. That letter went to the planning department. And then Mike Wylie came and verified that there is, in fact, a system there placed in wetlands.

THE COURT: All right. So your theory then on Count No. 24 and I presume also Count No. 25 and Count No. 26 is that when Mr. Shields installed these systems in wetlands, he did so at the behest of the defendants and that is the actual -- what I'm calling excavation or disturbing of the wetlands in violation of Section 404?

MS. HARRIS: That is so and that he was paid for his work, yes.

THE COURT: All right.

MS. HARRIS: And in addition, on Count 25, we also introduced through Eleanor Johnson that the system was in place at that time.

MR. KORZENIK: Your Honor, if I can add to that --

THE COURT: No. I'm only gonna listen to one argument from one lawyer. Okay? Ms. Harris is doing a magnificent job. You'll just confuse me if we get too many arguers.

(Off the record discussion between government counsel)

MS. HARRIS: I'm sorry. There is one additional thing. It's that the contracts for these lots, which are also in evidence, established that the septic systems were part of that contract and were gonna be installed pursuant. Those dates also correlate.

THE COURT: All right. And I presume that that is also your argument in Count No. 28, although no landowner testified concerning that property. But there are documents in evidence which would tend to show that underground pipes and a below ground disposal system was installed in Count No. 28.

MS. HARRIS: In addition, on Count No. 28, the EPA expert, Mike Wylie, had photographs and testified that there had been recent disturbance and that the drain field had been extended. And I believe John

Mizelle testified that the drain field had been extended on that lot in April of --

THE COURT: That must be what I missed. Because I made notes on all of the drain fields that Mr. Mizelle testified that he extended, but I don't remember him saying he extended U-17. But I think I understand your theory. And that's all I really need.

MS. HARRIS: Okay.

THE COURT: I'm not gonna resolve disputed questions of fact. I just want to try to understand what your arguments are. All right. Now, with regard to Count No. 30 --

MS. HARRIS: Yes.

THE COURT: And this was recent testimony that we heard from -- I think her name was Eleanor Johnson.

MS. HARRIS: That's correct.

THE COURT: About lot No. AF-18. Now, these are charges -- or these defendants are charged with violations of Section 402 of the Clean Water Act. And I presume that this is the discharging of a pollutant on a wetland.

MS. HARRIS: That's correct.

THE COURT: And of course, these questions that I ask you about these individual counts assume, without deciding, that they are jurisdictional wetlands. What evidence is there in Count No. 30 or what is -- point me, please, to the evidence which would tend to show that these defendants or someone on behalf of one of these defendants discharged a pollutant.

MS. HARRIS: The evidence on Count 30 specifically was testimony from Eleanor Johnson that she was living on the property at the time and that there was an ever growing pool of sewage in her yard. And in addition, there was testimony from Mike Wylie that her system is placed in wetlands.

THE COURT: Wait. Let me try to understand it now. Ms. Johnson testified that she's having a problem with her septic system and it is overflowing and there is an arguably -- well, not arguably -- in fact, there is a pollutant on the ground. What is the evidence that these defendants are the ones that put the pollutant on the ground?

MS. HARRIS: This is an 18 U.S.C. 2 -- one of the 18 U.S.C. 2 charges. And what we're contending is that it was the defendants who made it possible. They're the ones who through their scheme illegally installed a septic system in wetlands, then put an occupant on that property knowing that person was going to use the system and thereby made it possible for this pollutant to be discharged.

THE COURT: That would make Ms. Johnson a principal to the offense; isn't that so?

MS. HARRIS: That's correct. Unwitting in this case.

THE COURT: All right. Would that be true also of Count No. 31 and Count No. 32?

MS. HARRIS: That's correct. In 31, however, we did not call the landowner. These sewage surfacing on the property was testified to by Mike Wylie. And that's at page 112 of his presentation.

THE COURT: Wait a minute. Count what?

MS. HARRIS: Count 31, Z-9. No landowner. The testimony came in through Mike Wylie. And I believe it starts on page 112 of that slide presentation.

THE COURT: Correct. That there was actually –

MS. HARRIS: Surfacing sewage.

THE COURT: -- sewage on the ground.

MS. HARRIS: Correct.

THE COURT: But the evidence -- and let me try to be -- insofar as Count 30, 31, 32 and 33 are concerned, the government's theory is that by placing or having placed a septic system in wetlands that failed, the persons that came along later and actually filled it with sewage become the -- somehow the unwitting agents of these defendants.

MS. HARRIS: Correct.

THE COURT: All right. Would that also hold true for Count No. 28 -- Count No. 35?

MS. HARRIS: 35 -- let me see. We're back at 402.

THE COURT: No landowners testified about 35. I'm trying to --

MS. HARRIS: Norris Jones was the occupant. He did testify on lot G-2B.

THE COURT: Oh, I've got G-28. It's G-2B?

MS. HARRIS: It's G-2B.

THE COURT: Oh, I am so -- that is my error. That's G-2B.

MS. HARRIS: And both Norris Jones and Delaney Johnson testified about that lot.

THE COURT: Wait just a minute.

MS. HARRIS: Okay.

THE COURT: All right. So that I get this straight in my mind, Counts No. 30, 31, 32, 33, 34 and 35, those are all instances in which the government's theory is that the homeowners -- that is, the ones that actually live there and use the septic tanks -- are agents of the defendants who constructed or had put in place these failing septic tanks in the first place.

MS. HARRIS: That's correct.

THE COURT: And as such, they're in violation of the permitting requirement under Section 402 of the Clean Water Act.

MS. HARRIS: That's correct. And just to be perfectly clear, M.E. Thompson is not named in 33 and 34. It's just Robert Lucas and Robbie Wrigley.

THE COURT: All right. Okay. Thank you, Ms. Harris.

MS. HARRIS: Is that it?

THE COURT: That's it.

MS. HARRIS: No more questions?

THE COURT: Thank you.

MS. HARRIS: Thank you.

THE COURT: All right. I'll invite rebuttal argument, Mr. Wittman.

MR. WITTMAN: Yes, Your Honor.

THE COURT: And I may have some questions for you, too. And perhaps you may want to caucus with Ms. Diaz, and you may do so when I get to the questioning part.

MR. WITTMAN: I'll probably need to, Judge. Let me just, if I may, briefly respond to the legal arguments.

Insofar as Mr. Stokely's testimony was concerned about jurisdictional wetlands, he didn't actually delineate the wetlands between Big Hill Acres and navigable-in-fact waters. And neither did any other government witness. They looked at some aerial photographs. They looked at some maps. And they didn't actually go and try and delineate or ground-truth that entire area extending from Big Hill Acres to navigable-in-fact waters.

What they've really attempted to do throughout the case, Your Honor, is to establish a hydrological connection between a stream or a drain at Big Hill Acres and a navigable waterway located some four or five, six miles away.

Now, the Fifth Circuit in Needham pointed out that adjacency could not possibly include every possible source of water that flows into a navigable-in-fact waterway. And we established on cross-examination of the Corps of Engineers' witness -- Mr. Ephriam, Mr. Hough, even Mr. Stokely and Mr. Wylie -- that the wetlands at Big Hill Acres are not navigable-in-fact.

And if Your Honor will recall, I sort of painstakingly took Mr. Wylie through those pictures he had in his PowerPoint. And you saw the trees growing in the drains and the logs across the waterway that he said he found. And he had to admit really that all of those drains were not navigable-in-fact, nor is there any part of Big Hill Acres that's adjacent to a navigable-in-fact waterway.

Now, insofar as the point source argument is concerned, I remember that Ms. Pansy Maddox and several other representatives of the Mississippi Department of Health testified that a failed septic system constituted nonpoint source pollution. And the EPA's regulations themselves don't require an NPDES permit for a septic system.

So I think the government has totally failed to prove any discharge from a point source insofar as they're attempting to use a septic system as a point source. And I think that, just as a matter of law, is fatal to those counts.

Insofar as the mail fraud is concerned, Judge, the core of the fraud that the government has asserted in all of the mail fraud counts is that somehow the defendants conspired to represent -- or misrepresent lots as being suitable for habitation when, in fact, they're not.

Now, there are about 600 lots out at Big Hill Acres. There are hundreds of homeowners living out there. And people are living there every day with their children. And they're walking over those lots, living on those lots. Even the government witnesses who testified that they were living in streams of sewage, all when they went bankrupt went in and begged the bankruptcy court to let them keep the lot. They wanted to keep that property. They didn't want to let go of it.

And witness after witness that the government put on this stand proved inescapably that not only are these lots habitable, they're desirable. They wanted them. And they stayed there throughout all of the travails that they talked about. They're very habitable. And people wanted to stay there.

And I submit to Your Honor that that's the test. The habitability of the property at Big Hill Acres was proven conclusively by the government's own witnesses. So the fraud that they're talking about simply doesn't exist.

Moreover, if I'm right and the defendants are right on the jurisdictional wetlands issue, then there could not have been a misrepresentation as to wetlands that are subject to Section 404 of the Clean Water Act because they're not.

So I think that the mail fraud case falls under its own weight, Your Honor, based on the witnesses that the government itself produced. And that's my argument. And I'll be happy to answer any questions that the Judge has for me.

THE COURT: All right. Let me ask you a couple of questions. And this goes to the question of the jurisdictional wetlands. In your memorandum brief, you make a statement on page 3 --

MR. WITTMAN: Let me get my brief, Judge.

THE COURT: You make an assertion on page 3, which is repeated on page 4. And I will -- I'll quote from the last full sentence on page 3. "The government's regulation of wetlands that have a mere hydrologic connection with navigable waters is constitutionally invalid."

And then moving to the first full paragraph on page 4, I read this statement as well. "After expressly finding that wetlands which are hydrologically connected to navigable-in-fact waters are not regulated under CWA, the Fifth Circuit determined that the term adjacent cannot include every possible source of water that eventually flows into a navigable-in-fact waterway."

My question is this: Did the Fifth Circuit say -- let me be sure that I -- I want to define my terms. Not that they inferred. Not that they -- not that they did anything else other than say that a hydrological connection, as you stated on page 3 -- a mere hydrological connection is not sufficient to show a significant nexus between a wetland and a navigable waterway. Has the Fifth Circuit said that?

MR. WITTMAN: I don't think the Fifth Circuit actually said that, quite frankly. I infer that from the language used in the opinion.

THE COURT: I think that -- I appreciate your candor. I think you could with a straight face argue that they're almost there or that they meant that. But they've not said that, have they?

MR. WITTMAN: Not in exactly those words. I think we are, in effect, interpreting Needham the way we think the Court -- the Fifth Circuit intended the act to apply.

But in further response, if I could, Your Honor, I don't think there's been any showing of a significant nexus at this point either by the government.

THE COURT: Okay. All right. Do you wish to respond to the government's theory in Counts No. 30 through 35? And that is, that these homeowners were -- that by the -- the mere placing or causing to be placed of a septic tank on a wetland which was ultimately used by the homeowner, that somehow the homeowner became the agent of the -- agent of the defendants and then, therefore, the defendants are liable --

MR. WITTMAN: Yes, Your Honor.

THE COURT: -- for --

THE REPORTER: Liable for what, Judge?

THE COURT: The pollutants.

MR. WITTMAN: Your Honor, to begin with, simply putting a septic system on a lot in and of itself doesn't implicate Section 402. There's got to be a discharge. Now, it's true that there had to be a septic system on these properties because they're not connected to a central wastewater disposal system. Everybody knew that, including the people that bought those lots.

And they knew or should have known that in using septic systems you had to be careful to maintain them, not have them break down, not overload them. All the things that we've heard way too much testimony on over the course of the last four weeks.

But no matter how you cut it up, it's crystal clear that Mr. Lucas, Robbie Lucas and those two corporations did not operate those septic systems and didn't discharge themselves anything on to any navigable waterway, even assuming that that there's some connection between this property and a navigable waterway.

And when you look at the fact that under Section 402 and the regulations that the Corps itself has issued, it's only an operator of a facility that has to apply for and obtain an NPDES permit.

THE COURT: What is that section number? I had it at my fingertips earlier.

MR. WITTMAN: It's 40 C.F.R. Section 122.21(b). I never let that section escape my mind, Your Honor.

THE COURT: It's up here somewhere. I remember reading it. I think I left it on my desk. I don't need it right this second. Give me that again. 40 C.F.R. 122?

MR. WITTMAN: Ms. Diaz said I may be wrong. Let me make sure.

THE COURT: I think it's 33 C.F.R., isn't it?

MS. DIAZ: No. It's 40 C.F.R.

MR. WITTMAN: The cite I have in the footnote, Judge, is 40 C.F.R. Section 122.21(b).

THE COURT: I think that's correct. I had it here earlier. I think that regulation says, in essence, that as between the owner and the operator, it is the operator that has the responsibility to apply for the permit.

MR. WITTMAN: That's correct.

THE COURT: Did I state that accurately? Do you take issue with that, Ms. Harris? Did I state that accurately?

MS. HARRIS: I'm sorry. I don't have it in front of me.

THE COURT: Okay. I'll look at that to be sure. All right.

MR. WITTMAN: Anyway, I think it goes without saying that the government surely hasn't proven that any of the defendants operated septic systems at Big Hill Acres that are included in any of the counts of this indictment.

THE COURT: Do you concede, however -- let me ask you this. Do you concede, however, that in Counts 36 through 41, which are all instances in which the defendants or an employee of the defendants actually did remedial work to these septic systems and assuming that the jury were to believe that and they were to believe that these are jurisdictional wetlands, that that would have required a permit if they did remedial work which resulted in the spillage or the addition of --

MR. WITTMAN: No, Your Honor, I don't. Because first of all, if you will recall, there was an exchange of correspondence among the EPA, the Department of Health and Mr. Jimmy Palmer in which it was expressly stated that repairs -- temporary repairs to septic systems would be permitted and installers would not be prosecuted. There's that correspondence out there.

There's also testimony from the Mississippi Department of Health officials that you didn't need any kind of permission from the Mississippi Department of Health to repair a failing septic system. And given the fact that there's also been a lot of testimony that 40 to 50 percent of the installed septic systems in the State of Mississippi are indeed failing, it seems to me, Your Honor, that these Counts 36 through 41 cannot be sustained as a matter of law.

THE COURT: All right. I think you've answered my question. Yes.

MR. HOLDER: Your Honor, if I could just interject there. I don't think there's any proof that M.E. Thompson had any -- performed any remedial work at all.

THE COURT: Well, do you concede, though, that Mr. Thompson is charged in the conspiracy count? And that if the jury were to believe that there is a conspiracy here to violate the Section 402 Clean Water Act provisions and if you also believe -- well, if you believe that there's a conspiracy and that it does involve Mr. Thompson, that then Mr. Thompson is, by law, if the jury believes that, liable for the substantive conduct of his co-conspirators?

MR. HOLDER: No, sir, I wouldn't concede that. But then, again, I'm not getting into that part of it yet, of course. I don't see where there's been any proof of any conspiracy either. But no, I think at that point -- at the very most, they might have proved Mr. Thompson designed the system and certified it had been installed.

At that point, he's terminated from the situation. Was never notified of anything else. Never knew of anything else that went on. The government, if they notified anybody of any problem, certainly it wasn't Mr. Thompson.

THE COURT: Well, let me see if I can -- I may have -- my question may have been too compound.

MR. HOLDER: I understand. You're saying once he's in the conspiracy, he's in.

THE COURT: No, not only that. Under the Pinkerton doctrine, once a conspirator is in, is he not liable for the substantive offenses that are committed by the co-conspirators in furtherance of the conspiracy? Isn't that the law?

MR. HOLDER: But I think your question was they operated -- when you talked about the operators of the system -- of course, Mr. Thompson never had any involvement in it from that point on. So once the operators -- initially, that's the -- that would be the initiating point insofar as he's continuing with the conspiracy.

THE COURT: Okay. All right.

MR. HOLDER: So I would say no, he's not --

THE COURT: I think we may be at cross purposes. We may be talking about two different things. I'm past the aiding and abetting theory that the government has. I'm now talking about the remedial work that was done. And that's Counts 36 through 41.

MR. HOLDER: Yes, sir.

THE COURT: And I know that Mr. Thompson didn't actually do the remedial work. But it was done -- and this is -- again, these are questions of fact for the jury, but it was done by employees of Big Hill Acres.

And if the jury believes that Mr. Thompson was a member of the conspiracy, even though Mr. Thompson may not have participated in any of the substantive counts, 36 through 41, could the jury not conclude or could the jury not find under the Pinkerton doctrine that he is liable just like everybody else for the acts of his confederates -- substantive acts of his confederates? I think that's the law.

MR. HOLDER: I understand what you're saying, Judge. You're asking me my opinion, no, sir.

THE COURT: Okay. I'm trying to pin down the theories here so we can determine whether there are facts which support these theories. Okay. Go ahead, Mr. Wittman. I'm sorry.

MR. KORZENIK: May I just ask? Your Honor keeps referring to Counts 36 through 41. The grouping is from 34 -- I'm sorry -- 33 on, that there's -- that the same individuals are charged. It's under Paragraph 87 of the indictment. Yeah.

And Mr. Thompson is not charged in those counts.

THE COURT: He's not charged in 34 and 35. In 33, 34 and 35.

MR. KORZENIK: 33, 34, 35 through 41.

THE COURT: Mr. Thompson is not charged with any of those substantive offenses?

MR. WITTMAN: No, Your Honor.

THE COURT: Okay. All right. Well, then that's a nonissue then, isn't it? All right. But I think -- I think, Mr. Wittman, you answered my question.

MR. WITTMAN: Okay.

THE COURT: All right.

MR. WITTMAN: Any other questions, Your Honor?

THE COURT: Hold on just a minute. I think I had another question for Ms. Harris. Ms. Harris, I have heard Mr. Wittman's interpretation of the Needham case. What is the government's interpretation of the Needham case?

MS. HARRIS: First of all, Needham --

THE COURT: What are the limitations -- and recognizing that I am bound to apply the law in the Fifth Circuit and bound to apply the law that comes from the United States Supreme Court and flows through the Fifth Circuit and I'll not venture beyond those jurisdictions, if that -- if there is law there that I have to draw from. What is your -- what is the government's interpretation of what the Fifth Circuit said in Needham?

MS. HARRIS: One of the first things I'd want to point out is --

THE COURT: Actually, Needham and Rice. Because you have to read Needham and Rice together.

MS. HARRIS: I mean, I believe it's Footnote 4 in Rice that specifically says this is not a wetlands case, nor is Needham. And so for the defense to argue in their motion that Needham states this about wetlands, that's incorrect. They're not wetlands cases. And --

THE COURT: But didn't the Fifth Circuit in Needham, they do refer to wetlands, though. I notice in their conclusion under Headnote 15 that under Rice -- I quote now under Rice: "The OPC permits the recovery of cleanup costs in only two instances: One, if oil spills into navigable-in-fact waters; or two, if oil spills into nonnavigable waters or wetlands that are truly adjacent to an open body of navigable water." Aren't they --

MS. HARRIS: Where are you reading from?

THE COURT: Isn't the Fifth Circuit telling me here that this law, whatever it may be, applies to wetlands?

MS. HARRIS: Could you tell me where you were reading from? I'm sorry.

THE COURT: Under Headnote 15, the conclusion --

MS. HARRIS: Okay.

THE COURT: -- of Needham. That's on page 7. That would be at 354 F.3d -- this would be page --

MS. HARRIS: I see it.

THE COURT: Do you see it?

MS. HARRIS: Yes. It does say that. But what I'm saying is I think in the facts of Needham, the oil spilled on to dry land and then went into a ditch, which went to something else. The fact is the court did find jurisdiction in that case.

And what we've been arguing all along is even under what the court says here in Needham, which -- I mean, I do believe where it's stated it's dicta about what the jurisdiction is, that we meet that test. We have shown that we are adjacent to navigable-in-fact waters.

And there are a couple of more things, if I could, that I want to point out. First of all, the defense keeps making a lot out of the fact that the wetlands themselves are not navigable-in-fact. That you can't float a boat on them.

We've established that the parameters to identify wetlands include hydric soils and hydrophytic vegetation. They're not meant to be navigated. So I don't know that argument is getting them anywhere, but I do think it's kind of misleading.

I would also point out that --

THE COURT: I am not misled.

MS. HARRIS: Okay. The jury may be, but --

THE COURT: If it's intended to be --

MS. HARRIS: Okay.

THE COURT: -- misleading, I am not misled.

MS. HARRIS: That although -- we were talking about 40 C.F.R. Section 122, the owner operator.

We've been saying all along in this case that the landowners here are not the owners. They don't own this land yet. None of them do.

THE COURT: Well, are they the operators then?

MS. HARRIS: They're operators, but they're not the true owner.

THE COURT: As between the owner and the operator, who has the responsibility to get the NPDES permit?

MS. HARRIS: Well, we argued that in our motions. And I'll just have to refer the Court back to the brief. Because like I said, I don't have the C.F.R. in front of me. And I can't -- I just can't answer this at this moment.

THE COURT: My recollection is that it is the operator rather than the owner that would have the responsibility. For example, if I had a septic tank system and I owned it and I called Bo Shields to come out and fix it, it would be the responsibility of Bo Shields to get a permit to pollute. I keep calling it a permit to pollute. That's just the easy way to refer to it, a permit to pollute. Not me as the owner of the septic tank.

Because if Bo Shields is gonna spill pollutants all over the ground, he's the one that's got to have the permit to do that. I think that's -- am I wrong? Is it the other way around then? I can hire Bo Shields and he can spill sewage all over the ground, but it's my responsibility to -- the homeowner's responsibility to get the permit?

MS. HARRIS: I don't think it would be the installer's responsibility.

THE COURT: Okay.

MS. HARRIS: The other thing I wanted to point out is this argument we keep hearing also about repairs to systems. It may be that the regulations state that you don't -- you don't need a permit or whatever. But this was an unusual case. There had been a cease and desist issued regarding these systems by everybody. DEQ had sent letters. DOH. The Corps of Engineers had put out cease and desist. The EPA. And the letters clearly state that any repairs are to be made with health department involvement. So I just wanted to make that clear.

THE COURT: Okay. Well, to me, that's a question of fact for the jury. And whether the EPA decided to give somebody a freebie -- do you know how to spell that, Margaret, a freebie?

THE REPORTER: Yes, sir.

THE COURT: A freebie or not, the essential elements of the offense would still have been proven. That's a matter of defense rather than a question of law.

Okay. Is there anything else that anyone else needs to add that might be helpful?

MR. WITTMAN: I just want to add one point, Your Honor.

THE REPORTER: I can't hear you. I'm sorry.

MR. WITTMAN: That Mr. Guice called to my attention while I was sitting at counsel table while you were talking with Ms. Harris. In the Needham opinion at page 6, the Fifth Circuit stated the government's position with respect to the Clean Water Act. And I'm quoting it. The Court said, "According to the government, the definition covers all waters excluding groundwater that have any hydrological connection with navigable waters." And the Court then discussed that concept for a minute and went on to say: "In our view, this definition is unsustainable under SWANCC."

THE COURT: And that is why I believe that the defendant can argue with a straight face that the Fifth Circuit almost said it. But they did not come right out and say that a mere hydrological connection by itself was insufficient to establish a significant nexus. And had they said that, we might be going home.

MR. WITTMAN: Well, if you look a little further in that same paragraph, Judge, the Court goes on to say that the Clean Water Act and the Oil Pollution Act are not so broad as to permit the federal government to impose regulations over tributaries that are neither themselves navigable nor truly adjacent to navigable waters. And they cite Rice.

They go on finally to conclude: "Consequently, in this circuit, the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under SWANCC, a body of water is subject to regulation if the body of water is actually navigable or is adjacent to an open body of navigable water." And I think that's the test, Your Honor.

THE COURT: All right. I think I see where you're going. And I --

MR. KORZENIK: Your Honor --

THE COURT: I think that what has happened here is that, in the Fifth Circuit at least, the government may have great difficulty convincing anyone that there are any tributaries involved --

MR. TIMOTHY HOLLEMAN: Your Honor --

THE COURT: -- in this case.

MR. TIMOTHY HOLLEMAN: -- if I may on behalf of my client -- and I can stand here because it's not gonna be very long.

THE COURT: Yeah. We've got all day, Mr. Holleman. And anything that you think would be helpful, I'll be glad to hear.

MR. TIMOTHY HOLLEMAN: Well, I just want to make sure that my client's position is stated in the record on behalf of -- about Needham. The problem I have with the government's theory -- and Ms. Harris related the testimony to -- while I would argue with some of it, most of it she related accurately about Wylie and Stokely and others.

The problem I have with her testimony is that is what the Fifth Circuit said was quote/unquote not sustainable. The definition that all of their witnesses applied in this case, the Fifth Circuit requoted it and said, "In our view, this definition is unsustainable under SWANCC."

And so, you know, I don't see how -- and they even in a footnote talked about that that doesn't pass constitutional muster to stretch it as far as the government is attempting to stretch it.

The thing that Ms. Harris stated about Needham a minute ago that I think is absolute incorrect is that Needham found jurisdiction because the oil flowed down through the tributaries and the ditches, et cetera, and so even there they found jurisdiction.

The Fifth Circuit held because the oil made it into the open body of water or into a body of water that was immediately adjacent to an open body of water -- take that back. I misstated it. Because the parties stipulated that the oil made it into an open body of water or actually into Bayou Folse -- I don't know how you say that, F-O-L-S-E -- which was immediately adjacent to an open body of water. They found jurisdiction in that case.

We have no testimony in this case at all that anything ever made it in anything -- into any open body of navigable waters at all.

No testimony. No testing. The government went through great length to put on testing. And all that testing was right there on Big Hill Acres. It really surprised me a lot that they dipped the cup down in a septic tank that was failing and found that there was fecal coliform in there, but -- I was kind of shocked by that testimony. But that did not -- there's no testimony that ever left Big Hill Acres or even went into an open body of water anywhere.

And so I don't see how Needham is even subject to argument looking at the facts in Needham, what the Fifth Circuit said in Needham and applying it to what the government -- in the light most favorable to the government, I don't see how they even make an argument that they have sustained their burden of proof.

They're doing exactly what the government argued in Needham that the Fifth Circuit said was not sustain -- or unsustainable. And while -- I don't know how much more -- when Ms. Harris says that that's dictum, I don't know how much more specific the Fifth Circuit can get to say the definition that their witnesses gave -- to state it almost succinctly -- exactly what their witnesses stated. And then to say, "In our view, that definition is unsustainable under SWANCC." And then to say, "In this circuit, you may not simply impose regulations."

And we're talking about -- we're not talking about Mississippi Department of Health regulations or violations of that. As Your Honor has repeatedly stated, this is not about violations of Mississippi law. It's a violation of the Clean Water Act.

And I think that's what the Court is saying here. That these are not regulations that should be imposed where the state should have jurisdiction. It's a limited jurisdiction issue. And that's all it is. And in this case, their own witnesses testified exactly to what the Fifth Circuit in Needham, in my opinion, said was not -- was unsustainable.

THE COURT: All right. Again, I think I may have said it once before, that in this circuit, it may be very difficult for the government to sustain its proposition that intermittent streams, ditches, drainage swales and drainage ways are tributaries after Needham. But that's a matter of proper instructions to the jury.

Because the Fifth Circuit has never retreated from what the Supreme Court said in -- you all call it SWANCC, and I call it SWANNC, S-W-A-N-N-C. And that is that the test here is whether the wetlands here have a significant nexus.

All right. Let me take a look at all of this one more time. And I appreciate your arguments, and I appreciate your motions. I think you've helped me a great deal. Let me take a look at it. And we'll take a recess. And I'll come back and rule on the motions.

MR. TIMOTHY HOLLEMAN: I'm sorry, Your Honor. Are we excused for? How long did you say we were excused for?

THE COURT: I didn't say.

MR. TIMOTHY HOLLEMAN: Okay.

THE COURT: Stick around, though. I don't think I'll be too terribly wrong.

MR. TIMOTHY HOLLEMAN: I don't want to be sitting here come Wednesday morning waiting on you. I would if you wanted me to. Lawyers are very literal creatures.

THE COURT: Thank y'all.

(Recess at 2:30 p.m., until 2:54 p.m.)

THE COURT: All right. Ms. Harris, I did have one more question that I needed to ask the government that needed to be cleared up. If you could clear that up for me. That is as to Count 1 of the indictment. I think I know the answer, but I want to hear it from the government to be sure.

In Count 1 in the indictment, do you allege one conspiracy or three?

MS. HARRIS: One conspiracy with two objects; right? Let me just make sure. One conspiracy with three objects.

THE COURT: Okay.

MS. HARRIS: I'm sorry.

THE COURT: Thank you. I appreciate that.

All right. Let me take these counts in order. First of all, Count No. 1 alleges a violation of Title 18 of the United States Code Section 371. That is the general conspiracy statute. It is a one count indictment which alleges a conspiracy to commit three separate offenses.

As such, the government would be required to prove that there was an agreement between two or more persons to join together to accomplish some unlawful purpose. Specifically, that these defendants, with other persons -- at least one other -- made an agreement to commit at least one of the predicate offenses in Count No. 1 -- that is, mail fraud -- violation of Section 404 of the Clean Water Act or violation of Section 402 of the Clean Water Act, as charged in the indictment.

Secondly, they would have to prove that the defendants knew the unlawful purpose of the agreement and joined it willfully -- that is, with an intent to further the unlawful purpose.

And finally, the government would have to prove -- and these all would have to be proven beyond a reasonable doubt -- that one of these conspirators during the existence of the conspiracy committed at least one overt act to accomplish the unlawful purpose.

It's the opinion of the Court that there are sufficient facts from which a jury could conclude beyond a reasonable doubt that the government has met each of these essential elements of the offense of conspiracy in Count No. 1. The defendants' motion for judgment of acquittal as to Count 1 is denied.

Each of these defendants is charged in Counts No. 2 through 19 with a violation of Title 18 of the United States Code Section 1341 -- that is, mail fraud. The government would be required to prove in each of these separate counts that the defendants knowingly created a scheme -- that is, a scheme to defraud or to obtain money from these individual landholders through leases or purchases or rentals of property at Big Hill Acres under representations that the lots were suitable for habitation when, in fact, they were not.

The government will also have to prove beyond a reasonable doubt that each of these defendants acted with a specific intent to commit fraud.

And third, that the defendant or the defendants mailed something or caused another person to mail something through the United States postal service for the purpose of carrying out the scheme.

In the opinion of the Court, there are sufficient facts viewed in the light most favorable to the government from which a finder of fact could conclude beyond a reasonable doubt that each of these elements have been met. The defendants' motions to dismiss the mail fraud counts, Counts 2 through 19 -- not motion to dismiss -- motion for judgment of acquittal, Counts No. 2 through 19, is denied.

Now, none of this is particularly easy, but I think I've just gone over those parts which in my view are the easiest for me. Those were the conspiracy counts and the mail fraud counts.

What presents more of a challenge are Counts 20 through -- oh, gee. What is it, 41? Or 20 through 40? I don't remember how many counts there are. 20 through 41.

MR. WITTMAN: 41.

THE COURT: Which, in essence, constitute violations of the federal Clean Water Act in two particular methods -- two particular ways. One of which is failure to obtain a permit, and knowingly discharging pollutants from a point source during what I've referred to as the excavation or the creation of the Big Hill Acres properties. That would be under Section 404 of the Clean Water Act under which, I think, the permit would be required by the Army Corps of Engineers.

Under Section 402 of the Clean Water Act, that would be discharging a pollutant from a point source into wetlands, which are waters of the United States, without a permit, which under those circumstances would be a permit that is provided by the Environmental Protection Agency.

For purposes -- for purposes of these remaining counts for the time being, I am going to assume, without deciding, that these are jurisdictional wetlands -- that is, wetlands that constitute waters of the United States.

The government's theory as to Counts 30, 31, 32, 33, 34 and 35, I think, are unsustainable under the facts of this case. The defendants, which are charged with failing to obtain a permit under Section 402, have been charged under the theory that they created the circumstances under which the homeowner later on would come along and actually be the discharger of the pollutants into the ground and that somehow the homeowner would be the agent or, in essence, the principal involved in the offense.

Now, while the law certainly recognizes that any person can do for himself by causing someone else to do for him, this other person must -- the third person -- I'll call that the homeowner in this case -- must be not only acting under the direction of the defendant, but also agree to commit -- or to assist in committing the offense. There is no evidence in this case that any of these homeowners had the slightest idea that their conduct by causing the flushing of their toilet and adding to the pollutants in the ground somehow became the agents of these defendants.

It's the opinion of the Court that under this theory, there is insufficient evidence from which a jury could conclude that the defendants are guilty of violation of Section 402 of the Clean Water Act in Counts 30, 31, 32, 33, 34 and 35. Judgment of acquittal is granted as to those counts.

Now, again, for purposes of the remaining counts, both under Section 404 and Section 402, I will assume, without deciding, that these are jurisdictional wetlands. Counts 20 through 29 allege that the defendants discharged pollutants into waters of the United States by excavating wetlands, which constitute waters of the United States, without a permit under Section 404.

If one were to assume that these wetlands were, in fact, waters of the United States, all of those essential elements are present. There is evidence from which a jury could conclude in each of the counts -- and that is, Counts 20 through 29 -- that these defendants or agents on behalf of these defendants excavated or caused to be excavated and ultimately discharged pollutants as alleged in the indictment into wetlands.

Likewise, in Counts 36 through 41, there was evidence which tended to show that agents on behalf of the defendants engaged in repairs or extensions of drain field lines which would have resulted in the discharge of additional pollutants into wetlands without a permit as required by Section 402 of the Clean Water Act.

And assuming, without deciding, that these are, in fact, jurisdictional wetlands, the government will have made or would have made out a case sufficient for jury resolution on those facts.

Now, the more difficult question in this case is whether the wetlands at Big Hill Acres are or are not jurisdictional wetlands -- that is, wetlands which constitute waters of the United States. This Court is bound by United States Supreme Court precedent and by precedents in the Fifth Circuit Court of Appeals. Specifically, I am guided by the Riverside case, the SWANCC case -- which come from the United States Supreme Court case -- Rice v. Harken Exploration and In Re Needham.

The Supreme Court, as well as the Fifth Circuit Court of Appeals, has clearly pointed out that in order for wetlands to be considered waters of the United States, they must be adjacent to a navigable body of water.

The question of adjacency is somewhat more clear because they go on to say that in order for a wetland to be adjacent to a navigable body of water, it must have a significant nexus. In other words, there must be a significant nexus between the wetland and the navigable-in-fact body of water. That much is clear.

What becomes somewhat unclear from that point forward is: What does it take for the government to prove beyond a reasonable doubt that there is a significant nexus between the wetlands in this case and a navigable-in-fact body of water?

The government's evidence in this case -- and I think the government would -- I'm not gonna ask them to, but I think they would concede that it is in large part -- what I'll refer to as a hydrological connection between the Big Hill Acres wetlands and Section 10 waters downstream.

By that, I mean to say, it is the government's primary theory in this case that ditches and drainage swales, intermittent tributaries and the like are tributaries of Section 10 waters and, as such, are protected under the Clean Water Act as they downstream connect with navigable bodies of water.

The Fifth Circuit has clearly rejected that. They have rejected the concept that drainage ditches, intermittent streams and drainage swales constitute tributaries of navigable bodies -- navigable-in-fact bodies of water.

But the Fifth Circuit has never said and has never retreated from the concept of a significant nexus between a wetland and a navigable-in-fact body of water. They have never said that a hydrological connection in and of itself is insufficient to prove that significant nexus.

My research indicates that at least one district court case has concluded that a mere or a hydrological connection alone is insufficient to constitute a significant nexus. But that case kind of stands out there on its own. There are not very many cases that so conclude. And frankly, many of the other circuits have concluded otherwise.

So we're left again with a question here: What constitutes a significant nexus between the wetlands and the navigable-in-fact body of water? I would be much more impressed with the government's case if there were some evidence -- because in reading the Rice opinion and in reading the Needham opinion, I think that the Fifth Circuit does give us some indication -- some clue as to what might be factors that could be considered in determining whether there is a significant nexus between the wetland and navigable body of water, in fact.

For example, if there were some evidence of the flow ratio or the flow -- the flow of water from the wetlands to the navigable body of water. And we do not have that here. Some evidence that there is contamination at the Section 10 navigable body of water which is adjacent to the wetland. Whether there is some evidence which tends to show that there will be future contamination or a danger of contamination. And we don't have any of that here.

I would feel much more comfortable with the government's theory if there were some evidence of that. However, it's my opinion that even despite the fact that there is no hard evidence of contamination of a navigable body of water or hard evidence that any of the water from Big Hill Acres ever really reaches a navigable body of water, that with the proper instructions, a jury faced with all of the evidence that it has before it can make the proper determination -- can make the proper decision of whether or not these wetlands are adjacent to a navigable-in-fact body of water. And by adjacent to, I mean, whether there is a significant nexus. And that decision will be up to them.

I'm going to take the motion for judgment of acquittal under Rule 29 under advisement. I am permitted to do so, I believe, under Section C -- Section B of Rule 29, which allows the Court to reserve ruling.

And I am going to permit the jury to decide this fact -- this significant nexus question.

That is the -- that is the gravamen of this entire case and I think one that a properly instructed jury can -- a properly instructed jury can determine and give us their -- the product of their collective wisdom.

All right. Insofar as Counts No. 36 through 41 of the indictment are concerned as well as Counts 20 through 29, the Court will reserve ruling and permit the jury to decide the case with appropriate instructions.

Any questions on behalf of the government? Have I sufficiently, unintended, muddied up the waters? I didn't mean to put y'all on the spot. Not any questions about the law or about the facts. Any questions about the ruling that you don't understand?

MR. GOLDEN: I thought you were entertaining grousing.

THE COURT: I beg your pardon?

MR. GOLDEN: I thought you were entertaining grousing on the part of the government. General complaints about --

THE COURT: Oh, okay. No. Whining is excluded. No whining.

MR. TIMOTHY HOLLEMAN: I'm glad you came up with the appropriate term rather than grousing, Your Honor.

THE COURT: Let me try to summarize. The defendants' motions for judgment of acquittal in Counts 1 through 19 are denied.

Counts 20 through 29 are taken under advisement, and the Court reserves ruling after submission to the jury under Rule 29(c) of the -- 29(b) of the Federal Rules of Criminal Procedure.

Counts 30 through 35, the motion for judgment of acquittal is granted.

And on Counts 36 through 41, I likewise have taken those under advisement and reserved decision pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure.

MS. HARRIS: Your Honor, the only question is: In the grouping, Counts 33 through 39, which are all charged, like I said, in the indictment as one group, you're making a distinction between 33 and 35 and 36 and 39 that we don't quite follow.

THE COURT: You candidly agreed that the only evidence on Counts 30 through 35 that these defendants did anything is that they put in the system or caused the system to be put in. There was no evidence that you could point to that any of these defendants actually added the effluent or pollutant into the ground.

MR. KORZENIK: May I respond at all, Your Honor?

THE COURT: Go ahead, Mr. Korzenik.

MR. KORZENIK: It was -- the government's theory in all those counts was pretty much the same. And that was that those defendants had control over those systems. Not simply in placing them in the ground, but in their continued acceptance. And it goes with the ongoing nature of the control of accept -- of leasing this property in the same way that if a landlord were to rent an apartment and it was the understanding of the tenant that when he used his shower or toilet, that went into the city sewer system.

But unbeknownst to that tenant, the landlord decided he wasn't gonna pay his sewage bills any more, and he simply ran a straight pipe out into a creek.

The ownership and control of the actual apartment isn't the issue. Sure, it's being inhabited by a tenant who is using the facilities as any landlord would expect that tenant to use those facilities. But the liability for running that pipe into the stream would not be on the part of the tenant. It would be on the person who knew where that sewage was going.

So in that sense, there would be a -- technically speaking, a permit requirement placed upon the person who is in greatest control and knows where that sewage is going. And the same way here, this is a lease.

The defendants here had ongoing and continuous control even to the point -- I think there was evidence in the record here that even where lots were vacated with this same septic system -- and we had that just today with the testimony of Connie Taylor. After previous owners operating the same septic tank system left, they then simply signed another lease to sale contract with a new tenant.

So those who were in control of the system are those who were responsible for its proper operation. And that is the government's theory in this case.

There is a notion of agency, Your Honor, but it's a rather passive notion of agency. It's not as if people -- there's a notion of agency under which the agent understands the agency and willingly accepts activity or action on behalf of a principle. That's not the case here, Your Honor. These are passive agents.

The defendants set up a system in which no sewage was placed. But they set it up, our theory is, knowing -- not only knowing, but with full intent that those systems -- those lots would be leased and those systems would be used. It is unreasonable to expect -- and I think there was testimony here that the people owning -- buying these systems were not technically buying them because they were really leasing them or renting them.

Those people had no knowledge. And it was elicited from virtually every mail fraud witness here. They didn't know anything about permitting requirements. They didn't -- they were city people, they said. They didn't know one septic system from another. It was their understanding that it was functional and had whatever permits were required.

The government went into great lengths presenting testimony about what those regulatory requirements were, how much the defendants knew about those regulatory requirements, how many notices of warning they got not to continue placing septic systems in saturated soil. Voluminous testimony from various witnesses and from documents and letters.

Now, those were the people who were -- the defendants were clearly in control here. And the theory of -- under the Clean Water Act, an operator -- and this was -- all of these issues, Your Honor, with all due respect -- we cited in the briefs -- and honestly, we weren't expecting to be answering some of the same legal issues that we felt or understood the Court had resolved on all of the motions to dismiss in which all of these same issues were raised and we understood were resolved in favor of the indictment.

But I reiterate those arguments here. That under the Clean Water Act, the permit requirement goes to the -- goes to control. And in the Iverson case that we cited, it clearly states that --

THE COURT: All right. Mr. Korzenik, just answer me this question. Answer me this question candidly and into the record. Where is the evidence that these -- these defendants discharged a pollutant?

MR. KORZENIK: Your Honor, that's -- I was speaking to -- in the same way the renter of an apartment, knowing -- full well knowing what is going to happen with the toilets and the -- the showers, that -- it's an issue of control. That the septic system sitting there isn't discharging at all. It's --

THE COURT: All right. I think I understand your theory. I reject it. And I'll give you an opportunity to argue it to the Fifth Circuit. But there is no evidence on the counts that I have granted judgment of acquittal that these defendants -- these defendants -- not the homeowners, not anyone else -- that these defendants discharged anything in violation of Section 402.

What you want to do is you want to make them responsible for having designed a system or having put a system into the ground. But that's not what the act requires. An essential element of the act is that they must discharge a pollutant. And I don't think the government has made -- has met the burden of proof on that element.

MR. KORZENIK: Your Honor, if I may, the language is caused to be discharged. And that was what was alleged in the indictment. They caused to be discharged a pollutant. And that is the theory the government has had. That is our understanding of the law. And those are the facts, to the best of my knowledge, we've presented.

That they caused it to be discharged by designing a system in violation -- in spite of warnings, placing it in the ground and leasing it not once or twice, but often many times knowing that by leasing it, by having people occupy it, sewage would be discharged.

And there was ample notice as well from various witnesses that -- and this witness today that they were telling the defendants that sewage was being discharged. And it is the cause to be discharge theory, Your Honor, that we rely on.

THE COURT: I do not doubt your enthusiasm. I simply doubt your theory. And if I am in error, I welcome being corrected so I will not make this error again at sometime in the future. But this is a -- well, I state the obvious. This is a serious criminal matter. It's not a civil case. It's not a permit case. An administrative matter. It is a criminal case. And I think there must be some evidence that meets that essential element of the offense. And it is not here.

All right. That's my ruling.

MR. KORZENIK: Your Honor, may I ask the Court to allow the government to brief this issue?

THE COURT: I beg your pardon?

MR. KORZENIK: Could I ask the Court to allow us to brief this issue?

THE COURT: No. The ruling stands, Mr. Korzenik. And if I am in error, I will be corrected. I do not think that I am, or I wouldn't have done it this way. But I think that on those counts -- I'll give you the opportunity to argue that -- that theory to the

Fifth Circuit. Perhaps it's one that the government can employ in other cases as well under an aiding and abetting theory or a control and agency theory. I don't buy it. Motion is granted as to those counts.

All right. Anything else?

MR. WITTMAN: No, Your Honor.

THE COURT: All right.

MR. GOLDEN: Are we just gonna show up Wednesday and find out who their witnesses are?

THE COURT: No, we're not. Have you got a list for them? I think we talked about that yesterday.

MR. WITTMAN: I was gonna give it to them Tuesday night. But since he's made the request, I'll give it to him today. With one reservation. We're still working on this. It's a work in progress. But I think we've got enough witnesses for the government to get started on. And we may call over the weekend and tell counsel for the government that we are taking some of these folks off. In fact, I suspect we will. We're working with it. But we're giving the list to the government today --

THE COURT: All right.

MR. WITTMAN: -- which has a total of 66 witnesses, including character witnesses. And we expect to pare that down, Your Honor, to the level I mentioned to you yesterday afternoon in chambers.

THE COURT: Very good. Thank you.

MR. TIMOTHY HOLLEMAN: Your Honor, just so the record is clear and Your Honor understands, we are actively looking for some witnesses that would be specifically responsive to some of the witnesses who have testified both previously and recently. And so we may supplement that witness list depending on the results of our search.

THE COURT: Oh, okay. You're looking for witnesses to pick on Mr. Johnson?

MR. TIMOTHY HOLLEMAN: And others, Your Honor.

THE COURT: All right.

MR. TIMOTHY HOLLEMAN: I call it more a search for the truth for the record.

THE COURT: All right. Well, this is all -- I think we're all kind of fighting over the scraps that fall under the table. The truth of the matter is that the lynchpin of this case is whether or not these are jurisdictional wetlands or not. And that -- insofar as those wetlands -- Clean Water Act cases are concerned. That is not going to be answered here. Not today. Yes, sir.

MR. GOLDEN: Your Honor, I have received a list now of 66 people. I just wondered -- you know, the government was required to give them a list the day before of at least the ones they expected to call. I know we didn't go by it completely, but they pretty much tracked.

THE COURT: The truth is I didn't require it. You were just nice enough to do it. I would hope that the defendants will do the same.

MR. WITTMAN: We're gonna do the same.

MR. GOLDEN: That's what they said, that they would do that. So maybe Mardi Gras Day, you'll give it to us.

MR. WITTMAN: Mardi Gras morning, you will have it.

MR. TIMOTHY HOLLEMAN: If you'll meet me in front of the Biloxi City Hall at noon over there, I might be able to tell you.

THE COURT: Please -- for the same reason, so that the government will have the full opportunity to have meaningful cross-examination, please let them know at least the day before who you intend to call --

MR. WITTMAN: We will, Your Honor.

MR. TIMOTHY HOLLEMAN: We fully intend to do that,

Your Honor.

THE COURT: All right. Well, enjoy your weekend and I'll see you back here Wednesday morning at 9:00.

MR. WITTMAN: Thank you, Judge.

(Recess at 3:28 p.m.)

(February 9, 2005, 9:23 a.m.)

THE COURT: Good morning. I hope everyone is well. I had the opportunity to meet with counsel in chambers briefly, at which time everyone indicated they're refreshed, renewed and ready to move forward.

Let me, first of all, put on the record something that I've already discussed with the lawyers, and that is in regards to the Court's ruling on the defendants' Rule 29 motion for judgment of acquittal. I am reversing myself to this extent. I am going to reserve ruling on all of the Clean Water Act counts. And any counts that I've granted judgment of acquittal on heretofore, I have reversed myself in that regard and I will reserve ruling.

I do so because, as Mr. Korzenik pointed out, that would not be appealable. And I am not so naive -- I've pointed out to the lawyers in chambers, I'm not so naive that I would believe that I am infallible. I could be in error. And if I am in error, I should be corrected. And the only way to preserve that would be to take the matter -- reserve ruling on the Rule 29 motion and allow the case to go forward to the jury with proper instructions.

All right. Any questions? Mr. Wittman?

MR. WITTMAN: No, Your Honor. It's not a question really. But I think just for the sake of the record and so that I preserve our rights, I think that with respect to the Court's ruling on Thursday on Counts 30, 31, 32, 33, 34 and 35, I do believe that Your Honor's ruling does constitute a dismissal of those counts on the record. And I would suggest that our clients cannot continue to be tried under those counts without being twice placed in jeopardy. And for that reason, Your Honor, we would object to the Court's ruling. But that's the only thing I have to say about it.

THE COURT: I considered the possibility of that objection. I presume that the rest of the defendants join in that objection as well.

MR. TIMOTHY HOLLEMAN: Yes, sir, Your Honor.

MR. HOLDER: Yes, Your Honor.

THE COURT: But I note that there has been no evidence presented by the defendants yet and that nothing has occurred since the motion was ruled on. And I think I had pointed out in chambers that it's not that I have -- it's not that I have been inspired over the weekend by the government's theory of the case. Instead, it's more along the lines of preserving the matter for review. And I think that the government is entitled to that opportunity in the event that I am in error.

All right. Anything else on behalf of the defendants?

MR. WITTMAN: No, Your Honor.

THE COURT: Anything else on behalf of the government?

MR. KORZENIK: No, Your Honor.

THE COURT: All right. Then I presume we're ready to proceed? Please ask the jury to join us.

(Jury in at 9:28 a.m.)

THE COURT: Good morning, ladies and gentlemen. I met briefly with the attorneys in chambers this morning, and I think the consensus of the group was they were refreshed and renewed and ready to move forward. I presume that the jury is likewise refreshed and renewed. Long time no see. It's good to have you back.

We made some changes in the jury room to try to make it a little more homier, I guess would be the word for it. Hung some pictures and moved some things around. It's always nice when the judge gets in there with a laser level and levels up all the pictures and puts them up. But we had a great deal of help from the staff as well. And I hope that you enjoyed the surroundings. We're still moving in. And we're getting better at it every day.

The parties have indicated that they are ready to move forward. So Mr. Wittman, you may call your first witness.

MR. WITTMAN: Thank you, Your Honor. The defense calls Mr. James Palmer as its first witness.

THE COURT: Mr. Palmer, would you stand and be sworn, sir.

JAMES PALMER

APPENDIX H

Clean Water Act, 33 U.S.C. § 1251-52, 1344

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants

into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

§ 1342 (codified as section 402). National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator

determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding

sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

§ 1344 (codified as Section 404). Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section 1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of ac-

tivities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces"

within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

APPENDIX I

40 C.F.R. § 122

§ 122.1

(a) Coverage.

(1) The regulatory provisions contained in this part and parts 123, and 124 of this chapter implement the National Pollutant Discharge Elimination System (NPDES) Program under sections 318, 402, and 405 of the Clean Water Act (CWA) (Public Law 92-500, as amended, 33 U.S.C. 1251 et seq.)

(2) These provisions cover basic EPA permitting requirements (this part 122), what a State must do to obtain approval to operate its program in lieu of a Federal program and minimum requirements for administering the approved State program (part 123 of this chapter), and procedures for EPA processing of permit applications and appeals (part 124 of this chapter).

(3) These provisions also establish the requirements for public participation in EPA and State permit issuance and enforcement and related variance proceedings, and in the approval of State NPDES programs. These provisions carry out the purposes of the public participation requirements of part 25 of this chapter, and supersede the requirements of that part as they apply to actions covered under this part and parts 123, and 124 of this chapter.

(4) Regulatory provisions in Parts 125, 129, 133, 136 of this chapter and 40 CFR subchapter N and subchapter O of this chapter also implement the NPDES permit program.

(5) Certain requirements set forth in parts 122 and 124 of this chapter are made applicable to approved State programs by reference in part 123 of this chapter. These references are set forth in § 123.25 of this chapter. If a section or paragraph of part 122 or 124 of this chapter is applicable to States, through reference in § 123.25 of this chapter, that fact is signaled by the following words at the end of the section or paragraph heading: (Applicable to State programs, see § 123.25 of this chapter). If these words are absent, the section (or paragraph) applies only to EPA administered permits. Nothing in this part and parts 123, or 124 of this chapter precludes more stringent State regulation of any activity covered by the regulations in 40 CFR parts 122, 123, and 124, whether or not under an approved State program.

(b) Scope of the NPDES permit requirement.

(1) The NPDES program requires permits for the discharge of "pollutants" from any "point source" into "waters of the United States." The terms "pollutant", "point source" and "waters of the United States" are defined at § 122.2.

(2) The permit program established under this part also applies to owners or operators of any treatment works treating domestic sewage, whether or not the treatment works is otherwise required to obtain an NPDES permit, unless all requirements implementing section 405(d) of the CWA applicable to the treatment works treating domestic sewage are included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act, Part C of the Safe Drinking Water Act, the Marine Protection, Research, and Sanctuaries Act of 1972, or

the Clean Air Act, or under State permit programs approved by the Administrator as adequate to assure compliance with section 405 of the CWA.

(3) The Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal as a "treatment works treating domestic sewage" as defined in § 122.2, where the Regional Administrator finds that a permit is necessary to protect public health and the environment from the adverse effects of sewage sludge or to ensure compliance with the technical standards for sludge use and disposal developed under CWA section 405(d). Any person designated as a "treatment works treating domestic sewage" shall submit an application for a permit under § 122.21 within 180 days of being notified by the Regional Administrator that a permit is required. The Regional Administrator's decision to designate a person as a "treatment works treating domestic sewage" under this paragraph shall be stated in the fact sheet or statement of basis for the permit.

§ 122.2 Definitions

The following definitions apply to Parts 122, 123, and 124. Terms not defined in this section have the meaning given by CWA. When a defined term appears in a definition, the defined term is sometimes placed in quotation marks as an aid to readers.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Animal feeding operation is defined at § 122.23.

Applicable standards and limitations means all State, interstate, and federal standards and limitations to which a "discharge," a "sewage sludge use or disposal practice," or a related activity is subject under the CWA, including "effluent limitations," water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," pretreatment standards, and "standards for sewage sludge use or disposal" under sections 301, 302, 303, 304, 306, 307, 308, 403 and 405 of CWA.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in "approved States," including any approved modifications or revisions.

Approved program or approved State means a State or interstate program which has been approved or authorized by EPA under Part 123.

Aquaculture project is defined at § 122.25.

Average monthly discharge limitation means the highest allowable average of "daily discharges" over a calendar month, calculated as the sum of all "daily discharges" measured during a calendar month divided by the number of "daily discharges" measured during that month.

Average weekly discharge limitation means the highest allowable average of "daily discharges" over a calendar week, calculated as the sum of all "daily discharges" measured during a calendar week divided by the number of "daily discharges" measured during that week.

Best management practices ("BMPs") means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

BMPs means "best management practices."

Bypass is defined at § 122.41(m).

Class I sludge management facility means any POTW identified under 40 CFR 403.8(a) as being required to have an approved pretreatment program (including such POTWs located in a State that has elected to assume local program responsibilities pursuant to 40 CFR 403.10(e)) and any other treatment works treating domestic sewage classified as a Class I sludge management facility by the Regional Administrator, or, in the case of approved State programs, the Regional Administrator in conjunction with the State Director, because of the potential for its sludge use or disposal practices to adversely affect public health and the environment.

Concentrated animal feeding operation is defined at § 122.23.

Concentrated aquatic animal feeding operation is defined at § 122.24.

Contiguous zone means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

Continuous discharge means a "discharge" which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

CWA means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended by Pub.L. 95-217, Pub.L. 95-576, Pub.L. 96-483 and Pub.L. 97-117, 33 U.S.C. 1251 et seq.

CWA and regulations means the Clean Water Act (CWA) and applicable regulations promulgated thereunder. In the case of an approved State program, it includes State program requirements.

Daily discharge means the "discharge of a pollutant" measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the "daily discharge" is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the "daily discharge" is calculated as the average measurement of the pollutant over the day.

Direct discharge means the "discharge of a pollutant."

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no "approved State program," and there is an EPA administrative program, "Director" means the Regional Administrator. When there is an approved State program, "Director" normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State program. (For example, when EPA has issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval, see § 123.1.) In such cases, the term "Director" means the Regional Administrator and not the State Director.

Discharge when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

Discharge Monitoring Report ("DMR") means the EPA uniform national form, including any subsequent additions, revisions, or modifications for the reporting of self-monitoring results by permittees. DMRs must be used by "approved States" as well as by EPA. EPA will supply DMRs to any approved State upon request. The EPA national forms may be modified to substitute the State Agency name, address, logo, and other similar information, as appropriate, in place of EPA's.

DMR means "Discharge Monitoring Report."

Draft permit means a document prepared under § 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a "permit." A notice of intent to terminate a permit, and a notice of intent to deny a permit, as discussed in § 124.5, are types of "draft permits." A denial of a request for modification, revocation and reissuance, or termination, as discussed in § 124.5, is not a "draft permit." A "proposed permit" is not a "draft permit."

Effluent limitation means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.

Effluent limitations guidelines means a regulation published by the Administrator under section 304(b) of CWA to adopt or revise "effluent limitations."

Environmental Protection Agency ("EPA") means the United States Environmental Protection Agency.

EPA means the United States "Environmental Protection Agency."

Facility or activity means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

Federal Indian reservation means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

General permit means an NPDES "permit" issued under § 122.28 authorizing a category of discharges under the CWA within a geographical area.

Hazardous substance means any substance designated under 40 CFR Part 116 pursuant to section 311 of CWA.

Indian country means:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

(2) All dependent Indian communities with the borders of the United States whether within the originally or subsequently acquired territory thereof, and whether within or without the limits of a state; and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

Indirect discharger means a nondomestic discharger introducing "pollutants" to a "publicly owned treatment works."

Individual control strategy is defined at 40 CFR 123.46(c).

Interstate agency means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the CWA and regulations.

Major facility means any NPDES "facility or activity" classified as such by the Regional Administrator, or, in the case of "approved State programs," the Regional Administrator in conjunction with the State Director.

Maximum daily discharge limitation means the highest allowable "daily discharge."

Municipal separate storm sewer system is defined at § 122.26 (b)(4) and (b)(7).

Municipality means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of CWA.

National Pollutant Discharge Elimination System (NPDES) means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of CWA. The term includes an "approved program."

New discharger means any building, structure, facility, or installation:

(a) From which there is or may be a "discharge of pollutants;"

(b) That did not commence the "discharge of pollutants" at a particular "site" prior to August 13, 1979;

(c) Which is not a "new source;" and

(d) Which has never received a finally effective NDPES permit for discharges at that "site."

This definition includes an "indirect discharger" which commences discharging into "waters of the United States" after August 13, 1979. It also includes any existing mobile point source (other than an offshore or coastal oil and gas exploratory drilling rig or a coastal oil and gas developmental drilling rig) such as a seafood processing rig, seafood processing vessel, or aggregate plant, that begins discharging at a "site" for which it does not have a permit; and any offshore or coastal mobile oil and gas exploratory drilling rig or coastal mobile oil and gas developmental drilling rig that commences the discharge of pollutants after August 13, 1979, at a "site" under EPA's permitting jurisdiction for which it is not covered by an individual or general permit and which is located in an area determined by the Regional Administrator in the issuance of a final permit to be an area or biological concern. In determining whether an area is an area of biological concern, the Regional Administrator shall consider the factors specified in 40 CFR 125.112(a)(1) through (10).

An offshore or coastal mobile exploratory drilling rig or coastal mobile developmental drilling rig will be considered a "new discharger" only for the duration of its discharge in an area of biological concern.

New source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:

(a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or

(b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

NPDES means "National Pollutant Discharge Elimination System."

Owner or operator means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

Permit means an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part and Parts 123 and 124. "Permit" includes an NPDES "general permit" (§ 122.28). Permit does not include any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Person means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).

Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

(a) Sewage from vessels; or

(b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

NOTE: Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976).

POTW is defined at § 403.3 of this chapter.

Primary industry category means any industry category listed in the NRDC settlement agreement (Natural Resources Defense Council et al. v. Train, 8 E.R.C. 2120 (D.D.C. 1976), modified 12 E.R.C. 1833 (D.D.C. 1979)); also listed in Appendix A of Part 122.

Privately owned treatment works means any device or system which is (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a "POTW."

Process wastewater means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

Proposed permit means a State NPDES "permit" prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State. A "proposed permit" is not a "draft permit."

Publicly owned treatment works is defined at 40 CFR 403.3.

Recommencing discharger means a source which recommences discharge after terminating operations.

Regional Administrator means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

Schedule of compliance means a schedule of remedial measures included in a "permit", including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations.

Secondary industry category means any industry category which is not a "primary industry category."

Secretary means the Secretary of the Army, acting through the Chief of Engineers.

Septage means the liquid and solid material pumped from a septic tank, cesspool, or similar domestic sewage treatment system, or a holding tank when the system is cleaned or maintained.

Sewage from vessels means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under section 312 of CWA, except that with respect to commercial vessels on the Great Lakes this term includes graywater. For the purposes of this definition, "graywater" means galley, bath, and shower water.

Sewage Sludge means any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage. Sewage sludge includes, but is not limited to, solids removed during primary, secondary, or advanced waste water treatment, scum, septage, portable toilet pumpings, type III marine sanitation device pumpings (33 CFR Part 159), and sewage sludge products. Sewage sludge does not include grit or screenings, or ash generated during the incineration of sewage sludge.

Sewage sludge use or disposal practice means the collection, storage, treatment, transportation, processing, monitoring, use, or disposal of sewage sludge.

Silvicultural point source is defined at § 122.27.

Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

Sludge-only facility means any "treatment works treating domestic sewage" whose methods of sewage sludge use or disposal are subject to regulations promulgated pursuant to section 405(d) of the CWA and is required to obtain a permit under § 122.1(b)(2).

Standards for sewage sludge use or disposal means the regulations promulgated pursuant to section 405(d) of the CWA which govern minimum requirements for sludge quality, management practices, and monitoring and reporting applicable to sewage sludge or the use or disposal of sewage sludge by any person.

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe as defined in these regulations which meets the requirements of § 123.31 of this chapter.

State Director means the chief administrative officer of any State or interstate agency operating an "approved program," or the delegated representative of the State Director. If responsibility is divided among two or more State or interstate agencies, "State Director" means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

State/EPA Agreement means an agreement between the Regional Administrator and the State which coordinates EPA and State activities, responsibilities and programs including those under CWA programs.

Storm water is defined at § 122.26(b)(13).

Storm water discharge associated with industrial activity is defined at § 122.26(b)(14).

Total dissolved solids means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR Part 136.

Toxic pollutant means any pollutant listed as toxic under section 307(a)(1) or, in the case of "sludge use or disposal practices," any pollutant identified in regulations implementing section 405(d) of the CWA.

Treatment works treating domestic sewage means a POTW or any other sewage sludge or waste water treatment devices or systems, regardless of ownership (including federal facilities), used in the storage, treatment, recycling, and reclamation of municipal or domestic sewage, including land dedicated for the disposal of sewage sludge. This definition does not include septic tanks or similar devices. For purposes of this definition, "domestic sewage" includes waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works. In States where there is no approved State sludge management program under section 405(f) of the CWA, the Regional Administrator may designate any person subject to the standards for sewage sludge use and disposal in 40 CFR Part 503 as a "treatment works treating domestic sewage," where he or she finds that there is a potential for adverse effects on public health and the environment from poor sludge quality or poor sludge handling, use or disposal practices, or where he or she finds that such designation is necessary to ensure that such person is in compliance with 40 CFR Part 503.

TWTDS means "treatment works treating domestic sewage."

Upset is defined at § 122.41(n).

Variance means any mechanism or provision under section 301 or 316 of CWA or under 40 CFR Part 125, or in the applicable "effluent limitations guidelines" which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

Waters of the United States or waters of the U.S. means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act jurisdiction remains with EPA.

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Whole effluent toxicity means the aggregate toxic effect of an effluent measured directly by a toxicity test.

122.3 Exclusions.

The following discharges do not require NPDES permits:

(a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

(c) The introduction of sewage, industrial wastes or other pollutants into publicly owned treatment works by indirect dischargers. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the United States are eliminated. (See also

§ 122.47(b)). This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other party not leading to treatment works.

(d) Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 CFR Part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan) or 33 CFR 153.10(e) (Pollution by Oil and Hazardous Substances).

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

(f) Return flows from irrigated agriculture.

(g) Discharges into a privately owned treatment works, except as the Director may otherwise require under § 122.44(m).

(h) The application of pesticides consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality), in the following two circumstances:

(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to con-

trol mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

§ 122.21 Application for a permit (applicable to State NPDES programs, see § 123.25).

(a) Duty to apply.

(1) Any person who discharges or proposes to discharge pollutants or who owns or operates a "sludge-only facility" whose sewage sludge use or disposal practice is regulated by part 503 of this chapter, and who does not have an effective permit, except persons covered by general permits under § 122.28, excluded under § 122.3, or a user of a privately owned treatment works unless the Director requires otherwise under § 122.44(m), must submit a complete application to the Director in accordance with this section and part 124 of this chapter. All concentrated animal feeding operations have a duty to seek coverage under an NPDES permit, as described in § 122.23(d).

(b) Who applies? When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.

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SUPREME COURT, U.S.

No. 07-1512

In the Supreme Court of the United States

ROBERT J. LUCAS, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
KATHERINE W. HAZARD
KATHERINE J. BARTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the wetlands at issue in this case are "waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA); 33 U.S.C. 1362(7).

2. Whether a CWA permit is required for the discharge of pollutants from septic systems that are installed in and discharge directly into wetlands that are "waters of the United States."

3. Whether petitioners were properly held liable for violating the CWA by knowingly causing the discharge of pollutants from point sources into waters of the United States, even though petitioners did not own or operate the septic systems at the time the discharges from them occurred.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 13
Conclusion 21

TABLE OF AUTHORITIES

Cases:

International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) 4

Northern Cal. River Watch v. *City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), cert. denied, 128 S. Ct. 1225 (2008) 13, 14

Rapanos v. *United States*, 547 U.S. 715 (2006) . . . . *passim*

Solid Waste Agency of N. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) . . . 4, 5

United States v. *Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), cert. denied, 128 S. Ct. 45 (2007) 13

United States v. *Johnson*, 467 F.3d 56 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007) 13

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 4

United States v. *Robison*, 505 F.3d 1208 (11th Cir. 2007), petition for cert. pending *sub nom.* *United States* v. *McWane, Inc.*, No. 08-223 (filed Aug. 21, 2008) 13, 15

Statutes and regulations: Page

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*:
  33 U.S.C. 1251(a) 2
  33 U.S.C. 1311(a) (§ 301(a)) 2
  33 U.S.C. 1319(c)(2)(A) 2, 7, 8
  33 U.S.C. 1342 (§ 402) 3, 10, 12
  33 U.S.C. 1344 (§ 404) 3
  33 U.S.C. 1344(a) (§ 404(a)) 2, 3
  33 U.S.C. 1344(b) 3
  33 U.S.C. 1344(c) 3
  33 U.S.C. 1362(7) 2, 3
  33 U.S.C. 1362(12)(A) 2
18 U.S.C. 2 . . . . 8, 20
18 U.S.C. 371 1
18 U.S.C. 1341 . . . . 1, 7
33 C.F.R.:
  Section 122.1(b) 10, 20
  Section 122.1(b)(1) 11, 20
  Section 122.1(b)(2) 11, 20
  Section 122.2 . . . . 11, 20
  Section 328.3(a) 3
  Section 328.3(a)(1) 3
  Section 328.3(a)(5) 3
  Section 328.3(a)(7) 3
  Section 328.3(c) 3

Regulation—Continued: Page

40 C.F.R.:

Section 230.3(s) 3

Section 230.3(s)(1) 3

Section 230.3(s)(5) 3

Section 230.3(s)(7) 3

Miscellaneous:

Office of Water, U.S. EPA, *EPA 832-B-03-001, Voluntary National Guidelines for Management of Onsite and Decentralized (Clustered) Wastewater Treatment Systems* (2003) <http://www.epa.gov/owm/septic/pubs/septic_guidelines.pdf> 19

Scott P. Sowa et al., Missouri Res. Assessment P'ship, *A Gap Analysis for Riverine Ecosystems of Missouri: Final Report* (2005) 17

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 516 F.3d 316.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 2008. A petition for rehearing was denied on March 4, 2008 (Pet. App. 64a-65a). The petition for a writ of certiorari was filed on June 2, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioners were convicted on 18 counts of mail fraud, in violation of 18 U.S.C. 1341; one count of conspiracy, in violation of 18 U.S.C. 371; and 22 counts of knowingly discharging pollutants into waters of the United States without a permit, in violation of Section 301(a) of the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1311(a).[1] The individual petitioners were sentenced to prison terms ranging from 87 months to 108 months, three years of probation, and $15,000 in fines. The corporate petitioners were fined a total of $5.3 million. Each of the five petitioners was required to pay restitution of $1,407,400. The court of appeals affirmed. Pet. App. 1a-63a.

1. a. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). A person who "knowingly" violates that prohibition is subject to potential felony penalties. 33 U.S.C. 1319(c)(2)(A). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The CWA establishes two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the United States Army Corps of

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[1] Petitioner Robert J. Lucas, Jr., was convicted on all 41 counts; petitioner Robbie Lucas Wrigley was convicted on all counts of conspiracy and mail fraud and on 14 CWA counts (33 counts total); petitioner M.E. Thompson, Jr., was convicted on all counts of conspiracy and mail fraud and on seven CWA counts (26 counts total); petitioner Big Hill Acres, Inc., was convicted on all counts of conspiracy and mail fraud (19 counts total); and petitioner Consolidated Investments, Inc., was convicted on one count of conspiracy. Pet. App. 3a n.3, 4a.

Engineers (Corps), or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Section 402 authorizes the United States Environmental Protection Agency (EPA), or a State with an approved program, to issue a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of pollutants other than dredged or fill material. See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, *inter alia*, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[2] The Corps regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c).

b. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

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[2] To avoid confusion between the term "navigable waters" as defined in the CWA, see 33 U.S.C. 1362(7), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to actual or proposed pollutant discharges into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 729-730 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739 (plurality opinion), that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection to such water bodies, *ibid.*[3] Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167); see *id.* at 779-780. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Id.* at 780. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 810 & n.14 (Stevens, J., dissenting).

2. Petitioners are three individuals and two corporations. Petitioners defrauded hundreds of individuals who purchased house lots with septic systems in reliance on petitioners' false representations that the sites were habitable and that the sewage systems were functional and installed in compliance with state law. See Pet. App. 2a-3a, 37a-38a, 41a-42a. Robert J. Lucas, Jr., was the owner of Big Hills Acres, Inc. (BHA, Inc.) and Consolidated Investments, Inc., the companies under which

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[3] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 547 U.S. at 732 n.5.

the property was acquired and subdivided. *Id.* at 2a. M.E. Thompson, Jr., a private licensed engineer, designed the septic systems in question and certified that they were in compliance with Mississippi Department of Health (MDH) regulations, a certification that allowed the properties to be sold. *Id.* at 2a, 34a. Robbie Lucas Wrigley advertised, marketed, leased, and sold lots for residential use at the Big Hill Acres (BHA) development. *Id.* at 2a-3a, 41a.

The BHA development comprises 2620 acres located in Jackson County, Mississippi, approximately eight miles from the Gulf of Mexico. Pet. App. 2a; Tr. 1679. Approximately 1200 acres of the property are wetlands. Tr. 2029, 2068. The wetlands are part of a continuous system of wetlands, streams, bayous, and rivers that begins north of the site and extends through it south to the Gulf. Pet. App. 11a-12a.

The BHA lots were "not connected to a central municipal waste system, and County law required Lucas to certify and install individual septic systems on each lot." Pet. App. 2a. An MDH engineer initially performed the certification of the septic systems at the BHA site, but MDH rescinded many of its approvals when it discovered that the systems had been improperly placed in saturated soils. *Ibid.* Lucas then hired Thompson to perform the certifications. *Ibid.*

Beginning in 1997, the Corps, EPA, and MDH issued a series of warnings to petitioners that they were installing the septic systems in violation of state and federal law. Pet. App. 3a & n.2, 47a-48a. In 1999-2000, those agencies all issued cease and desist orders, but the violations continued. *Id.* at 3a & n.2, 14a n.25. Lucas's own employees warned him that the property was wet and likely regulated. *Id.* at 15a & n.28. Petitioners nevertheless ran newspaper advertisements describing the property as "high and dry," and Wrigley repeatedly represented to potential purchasers, even in response to specific inquiries, that the lots did not contain wetlands. *Id.* at 41a.

The evidence presented at petitioners' trial indicated, however, that "the lots were not in fact dry, as [petitioners] had advertised, and that residents encountered sewage problems on their wet lots." Pet. App. 41a. Septic systems failed and raw sewage backed up into toilets, bathtubs, showers, and sinks; spilled out over yards and flowed or washed to nearby streams; and created highly unpleasant odors. Tr. 396, 403, 555, 620, 1095, 1097, 1340, 1343, 1511-1512, 1518-1519, 1750, 1775-1777, 1919, 2622, 2464-2465, 2510, 2605, 2608, 3486, 3736, 3739, 3741, 3745. Unstable wetland soils resulted in subsiding driveways and home sites, causing homes to sink and buckle. Tr. 401, 404, 555, 1097, 1512, 1601, 2623.

3. On November 5, 2004, a federal grand jury returned a 41-count superseding indictment charging petitioners with various offenses relating to the development and marketing of the lots described above. See Pet. App. 3a-4a & n.3. Count 1 alleged that all petitioners had conspired to commit mail fraud, in violation of 18 U.S.C. 1341, and to discharge pollutants from point sources into waters of the United States, in violation of the CWA (33 U.S.C. 1319(c)(2)(A)), for the purpose of profiting from the sale of BHA properties that could not have been marketed if the public had known they contained wetlands and water-saturated soil. Counts 2-19 charged all petitioners except Consolidated Investments with undertaking a scheme to defraud by inducing individuals to purchase BHA lots under the false representation that those lots were suitable for habitation.

Counts 20-29 charged individual petitioners with knowingly causing the discharge of fill materials from excavation and earth-moving equipment into BHA lots containing wetlands covered by the CWA, in violation of 33 U.S.C 1319(c)(2)(A). Counts 30-41 charged individual petitioners with knowingly causing pollutants, including sewage and domestic wastewater, to be discharged from septic systems into BHA lots containing wetlands covered by the CWA, also in violation of 33 U.S.C. 1319(c)(2)(A). Counts 20-41 also charged petitioners under 18 U.S.C. 2 with aiding and abetting violations of the CWA.

After a 29-day trial, the jury found petitioners guilty on all counts. Pet. App. 2a. The district court sentenced Lucas to 108 months of imprisonment and sentenced Wrigley and Thompson to 87 months of imprisonment. The three individual petitioners were also sentenced to three years of probation and assessed $15,000 in fines. The court fined BHA, Inc., $4.8 million and Consolidated Investments $500,000; assessed $1,407,400 in restitution against each of the petitioners; and made special assessments of $7600 and $400 against BHA, Inc., and Consolidated Investments respectively. *Id.* at 61a & n.133.

4. The court of appeals affirmed. Pet. App. 1a-63a.

a. The court of appeals held that the evidence was sufficient to support the jury's determination that the wetlands into which petitioners discharged pollutants are "waters of the United States." Pet. App. 9a-13a. Without attempting to identify the controlling rule of law that emerges from the fractured decision in *Rapanos*, the court of appeals concluded that "the evidence presented at trial supports all three of the *Rapanos* standards"—*i.e.*, the standards endorsed by the *Rapa-*

nos plurality, Justice Kennedy's concurrence, and the four dissenters. *Id.* at 13a.

The court of appeals explained that, under the *Rapanos* plurality's standard, a wetland is covered by the CWA if it (1) is adjacent to "a relatively permanent body of water connected to traditional interstate navigable waters," and (2) "has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." Pet. App. 10a (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)). The court concluded that "[t]he evidence presented at trial is sufficient by the plurality's measure of federal waters." *Id.* at 11a. The court explained:

> One of the Government's expert witnesses at trial, Mike Wylie, described how he began at the westernmost drainage of the property and moved across, finding "flowing open water" north of the site and boat points on the western portion of the property "at the confluence of two tributaries." These tributaries had "strong flow" and "high velocity." Wylie showed photographs of his staff kayaking in tributaries connected to BHA wetlands as well as in several wetlands on the property. A jury could have reasonably concluded that these pictures show areas on the edge of the BHA property where "it is difficult to determine where the 'water' ends and the 'wetland' begins."

Id. at 11a-12a. The court of appeals additionally noted that the government had presented evidence showing multiple tributaries "all connected to the development property, and all eventually flowing into the traditionally navigable Tchoutachabouffa River, the Pascagoula River, and the Mississippi Sound." *Id.* at 12a. The court also cited testimony that "there is a continuous band of wetlands and streams and creeks that lead from the site to the waters." *Ibid.*

The court of appeals likewise concluded that the evidence was sufficient, under the standard set forth in Justice Kennedy's concurring opinion in *Rapanos*, to establish a "significant nexus" between the sites of the discharges and traditional navigable waters. Pet. App. 12a. Under that standard, the court explained, the relevant question is "whether 'wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.'" *Ibid.* (quoting *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring)). The court held that the government had satisfied that standard at petitioners' trial by "present[ing] evidence that the BHA wetlands control flooding in the area and prevent pollution in downstream navigable waters, evidence supporting the significant nexus standard of the *Rapanos* concurrence." *Ibid.*

b. Petitioners challenged the sufficiency of the indictment on Counts 30-41, which charged petitioners with violating the CWA by causing unpermitted discharges of sewage from the septic tanks into wetlands covered by the Act. Petitioners contended that the NPDES permitting requirements under Section 402 of the CWA "do not apply to individual septic systems." Pet. App. 17a. The court of appeals rejected that contention. *Id.* at 16a-27a.

The court of appeals explained that 40 C.F.R. 122.1(b) identifies two distinct sets of discharges for which an NPDES permit is required. Under subsection (1) of that regulatory provision, a permit is required "for the discharge of 'pollutants' from any 'point source' into 'waters of the United States.'" Pet. App. 18a (quoting 40 C.F.R. 122.1(b)(1)).[4] Under subsection (2), the permit requirement "*also* applies," with exceptions not relevant here, to "owners or operators of any treatment works treating domestic sewage, whether or not the treatment works is otherwise required to obtain an NPDES permit." *Id.* at 19a (quoting 40 C.F.R. 122.1(b)(2)). The court of appeals explained that subsection (2) identifies *other* sources, *in addition to* the point sources described in Section 122.1(b)(1), for which an NPDES permit is required. *Id.* at 20a-21a. Thus, although septic systems are not among the "treatment works" covered by subsection (2) of the regulation, they are still covered by subsection (1) if their operation involves the discharge of pollutants from "point sources" into waters covered by the CWA. See *id.* at 21a-23a.

The court of appeals concluded that the BHA septic systems are covered by 40 C.F.R. 122.1(b)(1) because (1) they are "containers," and thus are "point sources" within the meaning of 40 C.F.R. 122.2 (see note 4, *supra*); (2) they hold "solid waste" and "sewage," which are pollutants under applicable EPA regulations; and (3) they discharge directly into wetlands that are "waters of the United States." Pet. App. 23a-24a & n.43. The court of appeals explained that finding septic tanks to be "point sources" was consistent with case law, including the plurality opinion in *Rapanos*, which stated that any conduit that conveys a pollutant to covered waters is a point source. *Id.* at 24a-27a (citing, *inter alia*, *Rapanos*, 547 U.S. at 743 (plurality opinion)). The court of appeals therefore held that Counts 30-41 of the indictment sufficiently charged violations of the CWA. *Id.* at 27a.

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[4] Under 40 C.F.R. 122.2, the term "point source" is defined to mean "any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged."

c. Petitioners also challenged the jury instruction on Counts 30-41, which required a finding "that the defendants knew that they were discharging *or causing the discharge of* pollutants" from a point source into covered waters without a Section 402 permit. Pet. App. 29a-30a (quoting jury instruction) (emphasis added). Petitioners contended that they were not required to obtain a Section 402 permit because they neither owned nor operated the septic tanks. *Id.* at 30a. The court of appeals rejected that contention, concluding that petitioners could "be held indirectly liable for the discharges as aiders and abettors under 18 U.S.C. § 2." *Id.* at 31a (emphasis omitted). The court explained that "[a] principal is criminally culpable for causing an intermediary to commit a criminal act even where the intermediary has no criminal intent and is innocent of the substantive crime." *Ibid.* The court concluded:

> Although [petitioners'] personal septic waste was not the waste that entered federal wetlands, the attempted technical distinction between the "discharge of any pollutant" and "causing" this discharge is unavailing here. The lot owners eventually used the systems, but Defendants were the cause of their operation and their unlawful discharge from the systems. At minimum, they aided and abetted the operation of the septic systems and the resulting discharges.

Id. at 34a. The court of appeals held on that basis that the "jury instruction allowing conviction for 'causing' the discharge of pollutants was not an abuse of discretion." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 14-19) that this Court should grant review in order to clarify the controlling rule of law that emerges from *Rapanos*. Petitioners are correct that a circuit conflict exists on that question. The First Circuit has held that the CWA covers all waters that satisfy *either* the standard announced by the *Rapanos* plurality *or* the "significant nexus" standard described in Justice Kennedy's concurrence. See *United States* v. *Johnson*, 467 F.3d 56, 60-66 (2006), cert. denied, 128 S. Ct. 375 (2007). The Eleventh Circuit, by contrast, has held that CWA coverage may be established *only* under the standard set forth in Justice Kennedy's *Rapanos* concurrence. See *United States* v. *Robison*, 505 F.3d 1208, 1219-1222 (2007), petition for cert. pending *sub nom. United States* v. *McWane, Inc.*, No. 08-223 (filed Aug. 21, 2008).[5]

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[5] Petitioners contend (Pet. 14-15) that the Seventh and Ninth Circuits have also categorically held that Justice Kennedy's "significant nexus" standard is the controlling rule that emerges from *Rapanos*. That is incorrect. In *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), cert. denied, 128 S. Ct. 45 (2007), the court remanded the case for further proceedings in light of *Rapanos* and stated that "Justice Kennedy's proposed standard * * * must govern the further stages of this litigation." The court recognized, however, that cases may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality)," *ibid.*, and it did not specify what it regarded as the proper disposition of such a case. In *Northern California River Watch* v. *City of Healdsburg*, 496 F.3d 993

Petitioners are also correct that the question of which *Rapanos* standard controls is of great practical importance and warrants this Court's review. For that reason, the United States has filed a petition for a writ of certiorari seeking review of the Eleventh Circuit's ruling in *Robison*. See *United States* v. *McWane, Inc.*, No. 08-223 (filed Aug. 21, 2008). That petition explains (at 28-32) that the current circuit conflict significantly impedes the government's enforcement of the CWA and places substantial burdens on regulated entities.

This case, however, does not provide a suitable vehicle for resolution of the circuit conflict. In affirming petitioners' CWA convictions, the court of appeals did not purport to decide what rule of law emerges from the fractured decision in *Rapanos*. The court found it unnecessary to resolve the question that has divided the circuits because it determined that the evidence in this case was sufficient to establish CWA coverage under *each* of the competing standards set forth in the various *Rapanos* opinions. See Pet. App. 13a.[6] If the Court

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(9th Cir. 2007), cert. denied, 128 S. Ct. 1225 (2008), the court stated that Justice Kennedy's concurring opinion in *Rapanos* constitutes "the narrowest ground to which a majority of the Justices would assent if forced to choose *in almost all cases*," and that the *Rapanos* concurrence "provides the controlling rule of law *for our case*." *Id.* at 999-1000 (emphases added). As in *Gerke*, the court did not specifically discuss the proper resolution of a coverage dispute involving wetlands that have been shown to satisfy the *Rapanos* plurality's standard but not that of Justice Kennedy. Analysis of that question was unnecessary because the Ninth Circuit held that Justice Kennedy's standard *was* satisfied and that the wetlands at issue therefore were covered by the CWA. See *id.* at 1000-1001.

[6] While petitioners argued in the court of appeals that the jury instructions given at their trial were erroneous, see Pet. App. 4a-5a, they did *not* contend that the instructions were inconsistent with the stan-

were to grant certiorari in this case, petitioners' CWA convictions therefore would stand regardless of which of the *Rapanos* standards the Court found to be controlling. In *Robison*, by contrast, the court of appeals squarely held that coverage may be established *only* under Justice Kennedy's "significant nexus" standard, 505 F.3d at 1219-1222, and it stated that "the decision as to which *Rapanos* test applies may be outcome-determinative in this case," *id.* at 1224. The government's pending certiorari petition in *McWane* therefore squarely presents the issue that has generated the circuit conflict, while this case does not.[7]

2. Seeking to create at least the possibility that this Court's resolution of the circuit split might result in the reversal of their CWA convictions, petitioners contend (Pet. 20-25) that the Court should grant review not only to determine *which Rapanos* standard applies, but also to correct the Fifth Circuit's purported misinterpretation of the plurality and concurring opinions. Petitioners do not contend, however, that any conflict in authority exists on the proper understanding of either the *Rapanos* plurality's standard or that of Justice Kennedy. Nor do they provide any other basis for concluding that

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dards for CWA coverage articulated in *Rapanos*, see *id.* at 8a n.8. The court of appeals rejected the instructional challenge that petitioners did raise, *id.* at 8a, and petitioners do not renew that claim in this Court.

[7] Because the waters into which petitioners caused pollutants to be discharged are covered by the CWA both under the *Rapanos* plurality's standard and under that of Justice Kennedy, petitioners' own convictions would not be affected by any reasonably foreseeable decision on the merits that this Court might issue if the government's petition for a writ of certiorari in *McWane* is granted. The petition in this case therefore should not be held pending the Court's disposition of the petition in *McWane*.

clarification of the details of those standards warrants this Court's review.

In any event, petitioners are wrong in contending (Pet. 20) that the court of appeals' analysis "flatly misinterprets *both* the *Rapanos* plurality and the concurrence." With respect to Justice Kennedy's standard, the Fifth Circuit accurately described the relevant question as "whether 'wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.'" Pet. App. 12a (quoting *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment)). The court concluded that the proof at petitioners' trial was sufficient to establish coverage under the "significant nexus" standard because "[t]he Government presented evidence that the BHA wetlands control flooding in the area and prevent pollution in downstream navigable waters." *Ibid.* That understanding of the "significant nexus" standard is fully consistent with Justice Kennedy's recognition that, "[w]ith respect to wetlands, the rationale for [CWA] regulation is * * * that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage." 547 U.S. at 779 (Kennedy, J., concurring in the judgment).[8]

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[8] The BHA wetlands are located in five drainages that drain to three traditional navigable waters (Bayou Costapia, Old Fort Bayou Creek, and Bluff Creek). The evidence at petitioners' trial showed that the tributaries to which those wetlands are adjacent have persistent and substantial flows and travel through swamps, emergent wetlands, and braided forested wetland systems, each of which by its nature plays a critical role in maintaining the physical, chemical, and biological integrity of the watersheds of which it is a part. See Tr. 2966-3083. The evi-

Petitioners' attack (Pet. 21-25) on the court of appeals' application of the *Rapanos* plurality's standard is similarly flawed. The court of appeals specifically recognized that, under the plurality's standard, wetlands are covered by the CWA only if they have a "continuous surface connection" with a "relatively permanent body of water" that is connected to traditional navigable waters. Pet. App. 10a (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)).[9] And, contrary to petitioners' suggestion

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dence showed that pollutants discharged in the wetlands reached downstream waters. See, *e.g.*, Tr. 3746 (BHA resident testifying that she saw fecal matter and toilet paper flowing in streams adjacent to her lot). The government also submitted evidence that the BHA wetlands help to control flooding in the watersheds of Bayou Costapia, Old Fort Bayou Creek, and Bluff Creek by temporarily soaking up and storing stormwater. Gov't Exh. 78-b. The evidence further showed that the wetlands improve downstream water quality by intercepting surface runoff and removing or retaining its nutrients, processing organic wastes, and reducing sediment before it reaches these water bodies. *Ibid.* Petitioners' wetlands consultant agreed that the BHA wetlands trap sediment and prevent it from flowing downstream. See Tr. 4140, 4233.

[9] The government's evidence demonstrated the existence of a continuous band of wetlands and streams and creeks, with persistent or perennial flows, extending from the BHA wetlands to traditional navigable waters. See Pet. App. 12a; Tr. 3107. Based primarily on dash lines on a 1982 United States Geological Survey (USGS) map, petitioners' expert testified that the tributaries departing the BHA property were "intermittent streams." Tr. 4193-4194. Although the USGS is the most comprehensive, national-scale database available, errors in "distinctions between perennial and intermittent channels * * * can be quite large." Scott P. Sowa et al., Missouri Res. Assessment P'ship, *A Gap Analysis for Riverine Ecosystems of Missouri: Final Report* 105 (2005) (submitted to the USGS National Gap Analysis Program). Based on his visits to the site in April, May, November, and January, the government's expert testified that the tributaries were "persistent or perennial." Tr. 3107. Residents also testified to the abundance of flow sur-

(Pet. 22-23), the court did not misapprehend the type of "adjacency" or "continuous surface connection" that the *Rapanos* plurality's standard requires. Rather, the court of appeals recognized that the connection must be of a sort that "mak[es] it difficult to determine where the 'water' ends and the 'wetland' begins," Pet. App. 10a (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)), and it specifically found that the evidence in this case was sufficient to establish such a connection, see *id.* at 11a-12a.

At bottom, petitioners' real complaint is not with the court of appeals' explication of the governing standards set forth in the *Rapanos* plurality opinion and in Justice Kennedy's concurrence, but with the Fifth Circuit's assessment of the record evidence in this case. Petitioners' criticisms are misplaced. See notes 8-9, *supra*. But in any event, the wholly factbound challenges that petitioners seek to raise implicate no issue of continuing importance warranting this Court's review.

2. Petitioners contend (Pet. 26-33) that the court of appeals erred in holding that NPDES permits were required for the septic systems at issue in this case. Petitioners do not assert that the circuits are in conflict on

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rounding their properties (Tr. 3747, 5934), with one explaining that the nearby "whole valley is interlaced with many little rivulets" that come down to a stream "about five feet wide" that "runs most all the time" or is "always there" and "leads to Fort Bayou Creek," which becomes a traditional navigable water downstream (Tr. 3073, 3745, 5936). Both experts agreed that there are "intermittent drains" (Tr. 3227) within the wetlands on the BHA property, but those drains are merely part of the hydrology of the wetlands themselves and do not constitute the tributaries that the wetlands are adjacent *to*. See Tr. 3012 (area with intermittent drain is "one big wetland drain basin complex" without "well defined bed and bank"); 3134 (describing an "intermittent drain formed of wetlands").

this question. And because the court of appeals expressly limited its holding to the rare circumstance in which septic systems discharge pollutants directly into "waters of the United States" covered by the CWA, its decision lacks the broad practical importance that petitioners attribute to it.

Although septic systems typically do not require NPDES permits, that is because they do not generally discharge pollutants directly into "waters of the United States." The court of appeals explained:

> We recognize that we have not formerly encountered a case charging an operator of a septic system with failure to obtain an NPDES permit. This is likely because few cases have presented us with these unique circumstances, where a developer hired an engineer to approve and install septic systems directly in wetlands that are waters of the United States, thus making a system that is typically a diffuse, non-point source into a point source.

Pet. App. 23a-24a n.43. EPA guidance similarly notes that individual septic systems "may provide an alternative to conventional centralized wastewater systems," but that "any onsite or clustered wastewater treatment system that discharges pollutants from a point source to waters of the United States is * * * illegal and subject to enforcement action unless it is authorized by an NPDES permit issued by an authorized state or tribe or by EPA." See Office of Water, U.S. EPA, *EPA 832-B-03-001, Voluntary National Guidelines for Management of Onsite and Decentralized (Clustered) Wastewater Treatment Systems* (2003) <http://www.epa.gov/owm/septic/pubs/septic_guidelines.pdf>.

For similar reasons, petitioners are incorrect in contending (Pet. 28-29) that 40 C.F.R. 122.1(b)(2) exempted the septic systems at issue in this case from NPDES permitting requirements. Consistent with the plain language of Section 122.1(b), the court of appeals explained that an NPDES permit is required for sources that are covered *either* by Section 122.1(b)(1), which encompasses point sources that discharge pollutants into "waters of the United States," *or* by Section 122.1(b)(2), which extends the NPDES permitting requirements to certain "treatment works treating domestic sewage." 40 C.F.R. 122.1(b)(2); see Pet. App. 17a-24a. Because the term "treatment works treating domestic sewage" is defined to exclude "septic tanks or similar devices," see 40 C.F.R. 122.2, septic systems are not covered by Section 122.1(b)(2). As the sources on which petitioners rely (see Pet. 28-29) indicate, that exemption reflects EPA's decision not to require an NPDES permit for *every* residential septic system. But where, as here, particular septic systems discharge pollutants directly into "the waters of the United States," thus bringing them within the coverage of Section 122.1(b)(1), nothing in Section 122.1(b)(2) exempts them from NPDES permitting requirements.

3. Petitioners further contend (Pet. 26, 30-31) that, even if the septic systems at issue in this case were subject to NPDES permitting requirements, petitioners themselves cannot be held criminally liable for any unpermitted discharges because they did not own or operate the systems at the time the discharges occurred. In rejecting that argument, the court of appeals explained that petitioners had been charged as aiders and abettors under 18 U.S.C. 2, and it correctly recognized that "[a] principal is criminally liable for causing an in-

termediary to commit a criminal act even where the intermediary has no criminal intent and is innocent of the substantive crime." Pet. App. 31a. Petitioners do not dispute the court of appeals' understanding of general principles of criminal liability; they identify no reason to suppose that those background principles are inapplicable to criminal prosecutions under the CWA; and they cite no case that has arrived at a different result under circumstances like those presented here. Further review therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

RONALD J. TENPAS
Assistant Attorney General

KATHERINE W. HAZARD
KATHERINE J. BARTON
Attorneys

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In the Supreme Court of the United States

ROBERT J. LUCAS, JR., *ET AL.*, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

PHILLIP A. WITTMANN
DARIA BURGESS DIAZ
Stone Pigman Walther
Wittman LLC
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

GENE C. SCHAERR
Counsel of Record
JOHN FEHRENBACH
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

STUART ALTSCHULER
LINDA T. COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

Counsel for Petitioners
[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TIM C. HOLLEMAN
Boyce Holleman &
Associates
11240 Hwy 49 N.,
Ste. 400-D
Gulfport, MS 39503
(228) 539-6000

W. F. HOLDER II
400 East Railroad St.
Long Beach, MS 39560
228-863-4999

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 2
CONCLUSION 11

TABLE OF AUTHORITIES

PAGE(S)

CASES

Bell v. *United States*,
349 U.S. 81 (1955) 10

Gratz v. *Bollinger*,
539 U.S. 244 (2003) 4

Grutter v. *Bollinger*,
539 U.S. 306 (2003) 4

Leo Sheep Co. v. *United States*,
440 U.S. 668 (1979) 3

Quanta v. *LG Electronics*,
128 S. Ct. 2109 (2008) 3

Rapanos v. *United States*,
547 U.S. 715 (2006) .... *passim*

Simsbury-Avon Preservation Soc., LLC v.
Metacon Gun Club, Inc.,
472 F. Supp. 2d 219 (D. Conn. 2007) 8

Smith v. *Wade*,
461 U.S. 30 (1983) 10

Solid Waste Agency v. *U.S. Army Corps of*
Engineers,
531 U.S. 159 (2001) 1, 2

United States v. *Bass*,
404 U.S. 336 (1971) 9

United States v. *Johnson*,
467 F.3d 56 (1st Cir. 2006) (Torruella, J. dissenting) 7

United States v. *Lanier*,
520 U.S. 259 (1997) 10

United States v. *McWane, Inc.* (No. 08-223)
(filed August 21, 2008) .... *passim*

United States v. *Robison*,
505 F.3d 1208 (11th Cir. 2007) 8

United States v. *Santos*,
128 S. Ct. 2020 (U.S. 2008) 10

Virginia v. *Black*,
538 U.S. 343 (2003) 3

OTHER AUTHORITIES

American Heritage Dictionary of the English Language (4th Ed. 2006) 7

Congr. Res. Service, *Report for Congress, The Wetlands Coverage of the Clean Water Act Is Revisited by the Supreme Court: Rapanos* v. *United States* (Jan. 3. 2007) 3, 7

INTRODUCTION

The Government acknowledges that the issue of "the standard or standards to be used in determining" the coverage of the Clean Water Act (CWA) "under the fractured decision in *Rapanos*"—the fundamental question presented in this case—is the subject of "an acknowledged circuit conflict" and otherwise "a matter of exceptional importance." No. 08-223, *United States* v. *McWane, Inc.* (filed August 21, 2008), at 14-15 & 30n.7; *accord* Opp. 14. The Government also does not dispute that *this* case offers the Court a fair opportunity to resolve that issue and bring needed clarification to the scope of federal jurisdiction under the CWA. The Government, however, argues that *McWane* is "a *more suitable* vehicle" solely because the Fifth Circuit in this case held the evidence sufficient to satisfy the legal standards articulated by both the *Rapanos* plurality and the concurrence, whereas the Eleventh Circuit in *McWane* stated that there the difference between the plurality and concurrence in *Rapanos* "*may* be outcome-determinative." *Id.* at 31 n. 7 (emphases added).

This Court, of course, need not choose between these two "suitable vehicles": It can simply grant both petitions, as it did in *Rapanos.* In so doing, the Court can ensure that *one* of the cases before it (this one) arises in the context of wetlands regulation, which—as *Rapanos, SWANCC,* and *Riverside Bayview Homes* confirm—is both more recurring and of greater concern from a constitutional and policy standpoint than the regulation of direct discharges into flowing "open water." By granting both petitions, moreover, the Court can ensure that *one* of the Government's opponents—petitioners here—will vigorously urge adoption of the *Rapanos* plurality. But even if the Court felt compelled to choose between the two cases, this case, not *McWane,* would provide a more suitable vehicle to resolve the question presented in both petitions, while at the same time allowing the Court to decide two additional questions that are likewise of exceptional importance to property owners nationwide.

ARGUMENT

If the Court is going to expend the resources to determine which of the *Rapanos* opinions provides the controlling standard—as it well should—the Court will undoubtedly want to provide additional guidance on the proper *application* of whichever standard the Court chooses. Such additional guidance may even prove helpful (and perhaps crucial) to the Court's ability to reach a majority position. Yet in these respects, *McWane* is less "suitable" than this case.

1. First and foremost, *McWane* involved discharges into an open, flowing body of water—Avondale Creek—rather than, as here, a normally dry "wetland" that the EPA nevertheless considers a "water of the United States." Accordingly, any additional guidance provided in *McWane* about the meaning of the chosen legal standard is less likely to help lower courts determine the scope of federal jurisdiction over wetlands—the very context in which the constitutional and federalism concerns about the CWA are most acute. See, *e.g., Rapanos,* 547 U.S. at 721-22 (Scalia, J., plurality opinion); *id.* at 776 (Kennedy, J., concurrence); *SWANCC,* 531 U.S. at 174 (noting "significant constitutional questions" in the regulation of wetlands).

Federal jurisdiction over wetlands, moreover, implicates far more property, and property owners, than federal jurisdiction over flowing streams. Indeed, the nation has an estimated 100 million acres of wetlands, and approximately 75% of the wetlands in the lower 48 states are on private property. Congr. Res. Service, *Report for Congress, The Wetlands Coverage of the Clean Water Act Is Revisited by the Supreme Court: Rapanos* v. *United States* 6, 10 (Jan. 3. 2007). As a result, unlike flowing streams, there are an enormous number of disputes, in a variety of contexts, involving the federal government's jurisdiction over wetlands. *Id.;* see also *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 678 (1979) ("Because this holding affects property rights in 150 million acres of land * * *, we granted certiorari.").

2. Ironically, the only fact that the Government cites in arguing that this case is less "suitable" for resolving the scope of federal CWA jurisdiction—the fact that the Fifth Circuit purported to apply both the *Rapanos* plurality and the concurrence without deciding which standard controls—is one of the very things that makes this case a superior vehicle.[1] Although the Eleventh Circuit in *McWane* did opine on the meaning of the *Rapanos* plurality (and in a way that conflicts with the Fifth Circuit's decision in this case, see, *infra*, at 8-9), it did not opine on the meaning of the concurrence's "substantial nexus" standard. Indeed, the jury instruction in *McWane* did not attempt

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[1] Nor is there anything unusual in this Court's granting certiorari to resolve one vexing issue in circumstances that require the Court to also resolve another issue. See, *e.g.*, *Quanta* v. *LG Electronics*, 128 S. Ct. 2109 (2008); *Virginia* v. *Black*, 538 U.S. 343, 363, 367 (2003).

to articulate the "substantial nexus" standard, and the Government's witnesses did not attempt to establish such a nexus. Thus, the Eleventh Circuit simply had no occasion to apply that standard to the facts there.[2]

Here, by contrast, the court of appeals purported to apply both the *Rapanos* plurality's standard and the "substantial nexus" requirement. See Pet. App. 11a-12a. For that reason, this case gives the Court a clearer opportunity, once it has selected the governing standard, to provide needed guidance on the meaning and proper application of that standard.

3. The Government is also incorrect in contending (at 18) that, aside from the first question presented, this petition raises only "factbound challenges" that "implicate no issue of continuing importance." In fact, unlike *McWane,* this case not only gives this Court an opportunity to address the critical issue of whether residential homeowners and developers must obtain *federal* permits to install and operate or-

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[2] It is, of course, entirely *possible* that the Court could provide additional guidance as to the proper application of the "substantial nexus" standard if it granted the *McWane* petition and ultimately adopted that standard. And it is likely that the Court would provide additional guidance if it decided in *McWane* to adopt the standard of the *Rapanos* plurality. Accordingly, if the Court were to grant review in *McWane*, it should, at a minimum, hold this case pending decision in *McWane*.

On the other hand, if the Court elects to grant both petitions and consider both cases together, it should not consolidate the cases because the interests of the two sets of defendants are not sufficiently aligned to warrant joint briefing and oral argument. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Gratz* v. *Bollinger*, 539 U.S. 244 (2003). The Court should instead simply consider the cases in tandem.

dinary residential septic systems (Pet. Question 3 & 26-33),[3] it also gives the Court an opportunity to address critical *legal* issues in the proper applications of both the *Rapanos* plurality and the concurrence—the subject of the second question presented.

As explained in the petition (at 20-21), the critical *legal* error in the Fifth Circuit's application of the "substantial nexus" standard is its utter failure to require that the connection between the wetland at issue and a traditionally navigable body be "significant" or "substantial"—as the *Rapanos* concurrence expressly requires. *See* 547 U.S. at 780. But the Government simply ignores this problem: It points to nothing in the Fifth Circuit's opinion requiring (or holding) that the alleged, generic effect of these wetlands in "controlling flooding" and "preventing pollution" (Opp. at 16) was "significant" or "substantial." It points to no evidence from which the Fifth Circuit *could* have made such a finding. And it completely ignores the district court's express findings indicating that no such evidence was ever presented.[4] See Pet. 20-21.

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[3] The Government attempts to minimize the significance of the Fifth Circuit's holding on this point primarily by arguing that septic systems are point sources only in "rare circumstance[s]" because they "do not generally discharge pollutants directly into 'waters of the United States.'" Opp. 19. But that argument assumes that the sweeping interpretation of "waters of the United States" that the Government advanced in this case, and in *Rapanos,* is wrong: As the *Rapanos* plurality pointed out, under the Government's interpretation (as under the decision below), virtually "the entire land area of the United States" would constitute "waters of the United States" subject to federal jurisdiction. 547 U.S. at 722. And that of course would mean that vast numbers of residential septic systems *do*, in fact, "discharge pollutants directly into 'waters of the United States.'" Opp. 19.

Accordingly, if the Court decides to adopt the *Rapanos* concurrence, this case, unlike *McWane*, presents a clear opportunity to address a clean legal question about the proper application of the concurrence in this and all future cases: Does the CWA require the Government to demonstrate a "significant" or "substantial" effect on a downstream traditionally navigable water, and if so, what does that mean in the wetlands context?

Contrary to the Government's bald assertion (at 15), this is obviously a question of "continuing importance." Indeed, it has bedeviled not only the lower courts, but also the very federal agencies that the Government represents here. See Pet 16n.2 (collect-

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[4] The Government's assertion (at 5) that, in addition to engaging in discharges in violation of the CWA, petitioners "defrauded hundreds of individuals who purchased house lots ... in reliance on petitioners' false representations that the sites were habitable" is dead wrong. In fact, petitioners' mail fraud convictions were based upon sales of 18 specific home lots (not hundreds), which the Government claimed were wetlands subject to the EPA's jurisdiction, and, largely for that reason, were "uninhabitable." And that is no doubt why the district court repeatedly recognized that *all* of the claims against petitioners, including the mail fraud claims, were premised upon federal jurisdiction under the Clean Water Act. See Pet App. 118a.

The Government, moreover, presented no evidence that any of these lots was "uninhabitable" in fact. To the contrary, as shown in Appendix A, to the extent there was evidence on the habitability of these 18 lots, it showed that they not only *were* habitable, but most were in fact *inhabited* at the time of trial. And those that were vacant at trial had been inhabited for substantial periods and were vacated for reasons unrelated to their habitability. See App. A ing cases); *United States* v. *Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (Torruella, J. dissenting) (criticizing the "significant nexus" test as "opaque"); Congr. Res. Service, *supra*, at Summary ("[T]he outer geographic limit of CWA jurisdiction * * * has challenged regulators, landowners and developers, and policymakers for more than 30 years.").

On the other hand, if the Court adopts the standard embraced by the *Rapanos* plurality, this case presents a clean legal issue about the meaning of that standard as well. As explained in the petition (at 21-25), the critical error in the Fifth Circuit's application of that standard was its assumption that a "continuous" surface connection can be established based on evidence of a connection that, although "continuous" in the spatial sense, is not "continuous" in the temporal sense. That is a flat misinterpretation of the "continuous surface connection" standard, which requires temporal as well as spatial continuity. See 547 U.S. at 742; American Heritage Dictionary of the English Language (4th Ed. 2006) (defining "continuous" as including not just physical continuity, but the quality of being "uninterrupted in time").

Here again, the Government's brief largely ignores this problem. Although the Government claims (at 17n.9) that its evidence established "persistent or perennial flows" between the wetlands and a relatively permanent body of water, the Fifth Circuit never articulated such a requirement, let alone made such a finding. See Pet. App. 11a-12a. And nothing in the Government's description of its own evidence establishes a temporally continuous surface connection between a relatively permanent body of water and these wetlands: The closest the Government comes is a statement by one of its experts, based upon four visits to the property, that "the *tributaries*" running near the wetlands were "persistent or perennial." Opp. at 17n.9.

Here again, therefore, if the Court decides to adopt the *Rapanos* plurality's standard, this case will provide a clear opportunity to address a clean legal question about the meaning of that standard: Does the CWA require the Government to demonstrate a surface connection between the wetland and a relatively permanent body of water that is "continuous" both spatially and temporally? Or, as the Fifth Circuit assumed, is an intermittent but spatially continuous connection enough?

This too is a question of "continuing importance." *Compare* Opp. 15. Indeed, the same issue arose in *McWane* as a result of the district court's holding that the jury could find that the discharges were made into a "navigable water" even if the body of water into which they were made—Avondale Creek—flowed "only intermittently." *United States* v. *Robison*, 505 F.3d 1208, 1215 (11th Cir. 2007). Contrary to the Fifth Circuit's approach here, the Eleventh Circuit opined that this approach was inconsistent with the *Rapanos* plurality's standard—precisely because that standard requires temporal as well as spatial continuity. *Id.* at 1223-1224; see also, *e.g.*, *Simsbury-Avon Preservation Soc., LLC* v. *Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 229 (D. Conn. 2007) ("While plaintiffs have offered evidence showing that a surface water connection does *at times* exist, they offer no evidence demonstrating a continuous connection.") (emphasis added).

In short, the Fifth Circuit's opinion eviscerates the "substantial" component of the "substantial nexus" requirement of the *Rapanos* concurrence, and the court's assumption that a "continuous surface connection" does not require *temporal* continuity makes a mockery of the *Rapanos* plurality. It is therefore hardly surprising that the Government wishes to avoid having to defend the Fifth Circuit's analysis, which is squarely challenged in *petitioner's* version of the second question presented. Compare Pet. i with Opp. I.

4. As a vehicle for resolving the issues presented, this case is also superior to *McWane* because it brings into sharper focus the substantial liberty interests and due process concerns implicated by the Government's expansive interpretation of the CWA. Unlike the individual defendants in *McWane,* who were placed on probation, the individual petitioners here received—and are now serving—substantial prison terms, ranging from seven to nine years. Indeed, unless this Court vacates her conviction, one of the petitioners (Robbie Wrigley) will lose forever the opportunity to raise her son during the first seven years of his life—all because of an expansive interpretation of a law that all concede is ambiguous at best.

This case thus differs from *Rapanos,* which, as it came to this Court, involved only civil remedies, not criminal sanctions. The Court thus had no occasion to consider expressly the due process/fair notice issues presented by criminal prosecutions under a highly ambiguous statute, or the resulting requirement under the rule of lenity that, at least in that context, ambiguities be resolved, not in favor of the Government, but "in favor of the defendant." *United*

States v. *Bass*, 404 U.S. 336, 348 (1971); *see also* See *Smith* v. *Wade*, 461 U.S. 30, 41n.8 (1983) ("[I]n criminal law * * * terms [a]re generally more strictly construed than in civil law."); *United States* v. *Lanier*, 520 U.S. 259, 266-67 (1997); *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (U.S. 2008).

That is also why, although we believe petitioners would likely be vindicated under a proper application of the *Rapanos* concurrence—which the *McWane* defendants will necessarily endorse—we intend to argue on the merits that the *Rapanos* plurality should govern, at least in criminal cases, under the rule of lenity. See, *e.g., Santos,* 128 S. Ct. at 2025 ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). Certainly the fact that four Justices of this Court concluded that the CWA mandates the "continuous surface connection" requirement means that that interpretation is, at a minimum, a reasonable construction of the statute. See, *e.g., Bell* v. *United States*, 349 U.S. 81, 83 (1955) (applying rule of lenity when the Court could "not unreasonably reach either of the conflicting constructions"). And certainly it is far easier for a landowner to determine in advance whether a wetland on her property has a (temporally and spatially) "continuous surface connection" to a relatively permanent body of water, than to determine whether her wetland bears a "substantial nexus" to a traditionally navigable body of water miles away.

Of course, a decision from this Court that both enforces and clarifies the "substantial nexus" requirement could ameliorate the ambiguity and uncertainty that currently exists under that standard. But at this point, only the standard of the *Rapanos* plurality is sufficiently concrete and precise to pass muster under the due process principles and canons of construction applicable in the criminal context. And only the petitioners in this case (unlike the respondents in *McWane*) have any meaningful incentive to advocate that standard as controlling.

CONCLUSION

The Government's prosecution of the petitioners—and the Fifth Circuit's decision upholding several novel theories of liability—is unprecedented and, as the Government now admits (at 14), raises issues of "great practical importance." Unlike *McWane*, this case will permit the Court not only to resolve the *Marks* issue on which the courts of appeals are in express conflict, but also to articulate the proper understanding of whichever of the *Rapanos* standards the Court chooses, and to prevent the Government from subjecting virtually all who install or use residential septic systems to potential criminal liability for the resulting discharges.

The petition should be granted, and this case should either be briefed and argued along with *McWane*, or decided on its own.

Respectfully submitted,

PHILLIP A. WITTMANN
DARIA BURGESS DIAZ
Stone Pigman Walther
Wittman LLC
546 Carondelet Street
New Orleans, LA 70130
(504) 581-3200

GENE C. SCHAERR
Counsel of Record
JOHN FEHRENBACH
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

STUART ALTSCHULER
LINDA T. COBERLY
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

TIM C. HOLLEMAN
Boyce Holleman &
Associates
11240 Hwy 49 N.,
Ste. 400-D
Gulfport, MS 39503
(228) 539-6000

W. F. HOLDER II
400 East Railroad St.
Long Beach, MS 39560
228-863-4999

Counsel for Petitioners

SEPTEMBER 2008

APPENDIX

HABITABILITY OF LOTS SUBJECT TO MAIL FRAUD CLAIMS

Lot	Original Owner	Purchased	Inhabited At Trial? (2005)	Transcript Cites
YY-12	Karen Reynolds	1999	Yes	429, 434-36, 449
AG-11	Jacqueline Peterson	1999	Yes	579-80, 595-96
KK-5	Nancy Watford	1998	No, but owner lived there until 2002, and no evidence tied the vacancy to habitability issues. Watford reaffirmed her lot debt in bankruptcy.	617-18, 645; 653
E-13	Patrick Brossett, Sr.	1997	Yes	2631-33; 2641
II-3 & II-2	Joseph Grayson	1997	Yes, and owner purchased a second lot.	1088-89; 1163-64; 1178-79
G-2B	Norris Jones	1998	Yes	1357, 1363-66
AA-17	Richard Wenniger	1998	Yes	1508, 1510, 1526, 1546, 1566-67
U-15	Phillip Johnson	1998	Yes	2756-58
U-15	Becky Anderson	2004	Yes	2892
AM-6	Dawn McNiece	2000	Yes	Sent. TR 115
M-6	Ruth Hayes	1997	Yes	1582
V-6	Christa Spence	1997	Yes	1745; 1753
O-1	Gwynn Spiers	1997	Yes. Current resident testified she had no problems with the lot or septic system.	1773-74; 1781-82; 4105-06
NN-9	Dee Micele	1998	Yes	1916; 1922; 1949

Lot	Original Owner	Purchased	Inhabited At Trial? (2005)	Transcript Cites
YY-15	Allen Patterson	1998	Yes	2461; 2487
GG-4	Patricia Griswold	1999	No. Owner lived there until 2004, and no evidence tied the vacancy to habitability. Griswold also reaffirmed her lot debt in bankruptcy.	2502-03; 2549
AF-18	Eleanor Johnson	1999	No. Owner's trailer was repossessed in 2003. No evidence tied the vacancy to habitability.	3729- 3305-06
LL-3	Steve Martin	2000	No. Owner was transferred by the Navy in 2003, and he rented out the property until August 2004. The lot was on sale at the time of trial. No evidence tied the vacancy to habitability issues.	3476; 3487; 4311-4312
YY-1 & YY-2	Henry Johnson	1999	No. Original owner moved in 2003, and renter lived there until owner evicted him before trial for failure to pay rent. No evidence tied the vacancy to habitability.	3729; 3305-06
AG-5	Dawn Sullivan	2000	Yes	3597-98; 617-18
JJ-6	Connie Taylor	2000	Yes	3725-26; 3772-73

78

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No. 07-1512

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT J. LUCAS, JR., *et al.*

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING PETITIONERS

DUANE J. DESIDERIO
THOMAS J. WARD*
**Counsel of Record*
JEFFREY B. AUGELLO
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, D.C. 20005

(202) 266-8146

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER,
LITIGATION CENTER, INC.
1615 H STREET, N.W
WASHINGTON, D.C. 20062

(202) 463-5337

July 7, 2008

QUESTIONS PRESENTED

Amici will address the first and second questions presented:

1. In applying *Rapanos v. United States*, 547 U.S. 715 (2006), to determine federal jurisdiction over wetlands under the Clean Water Act, are federal courts bound to apply the analysis of the plurality decision, the concurrence, or some other standard?

2. Under whichever approach the Court chooses, did the Fifth Circuit err in holding that federal jurisdiction under the Act extends to a wetland that merely "neighbors" a "tributary" of a navigable water, without requiring that the wetland have a *continuous* surface connection with a relatively permanent body of water, or that it *significantly* affect the quality of traditional navigable waters?

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE LOWER COURTS NEED GUIDANCE ON WHICH TEST FROM *RAPANOS* CONTROLS QUESTIONS OF CWA JURISDICTION 4

A. The "Narrowest Grounds of Concurrence" from *Rapanos* are Impossible to Discern 4

B. Specific Areas of Consensus Among The *Rapanos* Justices *are* Discernable—and Should be Announced by a Majority of This Court 11

II. GUIDANCE FROM THIS COURT IS NECESSARY TO CLARIFY THE MEANING OF "TRADITIONAL NAVIGABLE WATERS" 17

A. The *Rapanos* Plurality and Concurrence Relied on *The Daniel Ball* and *Appalachian Electric* in Discussing TNWs 19

B. A Waterbody is a TNW if it Satisfies Three Criteria 20

TABLE OF CONTENTS cont.

Page(s)

III. THIS COURT SHOULD APPLY THE RULE OF LENITY TO RESOLVE AMBIGUITIES ON THE MEANING OF STATUTORY "NAVIGABLE WATERS" 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs, 425 F.3d 1150 (9th Cir. 2005), *cert. denied*, 127 S. Ct. 1258 (2007) ... 10

Escanaba Co. v. Chicago, 107 U.S. 678 (1883) ... 21

Grutter v. Bollinger, 539 U.S. 306 (2003) ... 5

Leovy v. United States, 177 U.S. 621 (1900) ... 21

Liparota v. United States, 471 U.S. 419 (1985) ... 25

Marks v. United States, 430 U.S. 188 (1977) ... 4, 5, 11

Nichols v. United States, 511 U.S. 738 (1994) ... 5

Northern Cal. River Watch v. City of Healdsburg, 496 F.3d 999 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1225 (2008) ... 6, 10

Rapanos v. United States, 547 U.S. 715 (2006) ... *passim*

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) ... 5

Rowe v. Granite Bridge Corp., 38 Mass (21 Pick.) 344 (1838) ... 21

San Francisco Baykeeper v. Cargill Salt Div., 481 F.3d 700 (9th Cir. 2007) ... 8

Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, 472 F. Supp. 2d 219 (D. Conn. 2007), appeal docketed, No. 07-0795CV (2d Cir. Mar. 2, 2007) ... 9-10

TABLE OF AUTHORITIES cont.

Page(s)

The Daniel Ball, 77 U.S. 557 (1870) 19, 20, 21

The Montello, 87 U.S. 430 (1874) 21

United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) 19, 22

United States v. Bailey, 516 F.Supp. 2d 998 (D. Minn. 2007) 10

United States v. Bass, 404 U.S. 336 (1971) 25

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United States v. Holt State Bank, 270 U.S. 49 (1926) 21-22

United States v. Johnson, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 128 S. Ct. 375 (2007) 6-7, 9, 11

United States v. Lucas, 516 F.3d 316 (5th Cir. 2008) 18

United States v. Morrison, 178 Fed. Appx. 481 (6th Cir. 2006), *cert. denied*, 127 S. Ct. (2007) 10

TABLE OF AUTHORITIES cont.

Page(s)

United States v. Moses, 496 F.3d 984 (9th Cir. 2007), *cert. denied*, 544 U.S. ----, (June 23, 2008) 10

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) 21

United States v. Robison, 505 F.3d 1208 (11th Cir. 2007) 7

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) 8

United States v. Santos, 128 S. Ct. 2020 (2008) 25

United States v. Utah, 283 U.S. 64 (1931) 22

Utah v. United States, 403 U.S. 9 (1971) 22

Statutory and Regulatory Provisions

33 U.S.C. § 403 17

33 U.S.C. § 1311 24

33 U.S.C. § 1319 24

33 U.S.C. § 1362 .... 3, 17, 24

OTHER

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INTERESTS OF THE *AMICI CURIAE*

The National Association of Home Builders ("NAHB") and the Chamber of Commerce of the United States of America ("Chamber") have received the parties' written consent to file this *amicus curiae* brief supporting Petitioner.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. Its members are frequently subject to regulation under the Clean Water Act ("CWA"). As a result, NAHB has developed comprehensive familiarity with the CWA's permitting requirements, provides compliance advice to its members, and has witnessed numerous situations where federal regulators have exercised authority beyond the CWA's limits.

The Chamber is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, *amici* state that their counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amici* made a monetary contribution to its preparation.

This case is important to the *amici* because it involves the scope of the jurisdiction of the federal government over certain waterbodies under the CWA. Many of *amici*'s members have had development plans ruined by the Corps' assertion of CWA jurisdiction over their property. Other members have been denied the potential economic benefits that result from development. As the principal voice of the American business community, the Chamber is well-suited to present the interests of business in this case.

NAHB and the Chamber frequently participate as party litigants and *amicus curiae* to safeguard the rights and interests of their members. NAHB was a recent petitioner in a CWA case, *NAHB v. Defenders of Wildlife,* 551 U.S. ---, 127 S.Ct. 2518 (2007). Attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as *amicus curiae* or "of counsel," in a number of matters involving landowners aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

SUMMARY OF ARGUMENT

I. ***Which Test From Rapanos Controls?:*** The 4-1-4 decision in *Rapanos v. United States,* 547 U.S. 715 (2006), failed to articulate a unifying theory to determine the scope of "navigable waters" under the CWA. A pronounced split among the circuit courts of appeals has thus developed on the "correct" test for ascertaining the CWA's scope. Millions of acres of property will remain in regulatory limbo until a majority of this Court announces the guiding test for "navigable waters" jurisdiction.

II. ***Guidance is Necessary to Clarify the Meaning of "Traditional Navigable Waters":*** In *Rapanos,* both the plurality and concurrence articulated that CWA jurisdiction is tied to traditionally navigable waters ("TNWs"). *Infra* pp. 17-18. The courts below incorrectly equated navigable-in-fact waterbodies with TNWs.

III. ***The Court Below Should Have Applied the Rule of Lenity:*** Neither the courts nor the agencies have a clear understanding "waters of the United States" covered by the CWA. 33 U.S.C. § 1362(7). Because of the ambiguity, the Fifth Circuit should have resolved questions of the Act's coverage in the Petitioners' favor and found that the wetlands at issue are not within the CWA.

ARGUMENT

I. THE LOWER COURTS NEED GUIDANCE ON WHICH TEST FROM *RAPANOS* CONTROLS QUESTIONS OF CWA JURISDICTION.

A. The "Narrowest Grounds of Concurrence" from *Rapanos* are Impossible to Discern.

The Petition describes the tests for Clean Water Act ("CWA") jurisdiction announced by the different *Rapanos* opinions—in particular, the "relatively permanent waterbody" test used by Justice Scalia in his plurality opinion, and the "significant nexus" test used by Justice Kennedy in his concurrence in the judgment. Pet. at 4-6. Petitioners also set forth (Pet. 14-16) the circuit conflict on whether and how the principles from *Marks v. United States,* 430 U.S. 188 (1977), apply to discern a holding from *Rapanos*, where a majority of the Justices failed to agree on a categorical test for CWA coverage. The oft-cited "rule" from *Marks* is:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those members who *concurred in the judgments on the narrowest grounds.*'"

Marks, 430 U.S. at 193 (emphasis added) (citations omitted). The *Marks* formulation has not been a favorite of this Court. "This test is more easily stated than applied," and it is "not useful to pursue the

Marks inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745-46 (1994).

Hidden in Chief Justice Roberts's concurrence, there is a single, oblique reference to *Marks*:

> It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. See *Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (discussing *Marks v. United States*, 430 U.S. 188 ...(1977)).

Rapanos, 547 U.S. at 758 (Roberts, C.J., concurring). Thus, the Chief Justice did not rely on *Marks* as direct authority, but simply noted the case as "discuss[ed]" in *Grutter*.[2] None of the individual *Rapanos* opinions provides any analysis of *Marks*, or how *Marks* may be used to make sense of the Justices' differing approaches for CWA coverage.

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[2] In *Grutter*, the Court questioned whether Justice Powell's lone concurrence in the 4-1-4 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), decision was controlling under *Marks*. It found that it was not necessary to answer that question as a majority of the Court ultimately endorsed Justice Powell's view. *Grutter*, 539 U.S. at 325. *Grutter* does not extol *Marks* as a model of clarity, but rather cites *Nichols*, to recognize that *Marks* "has so obviously baffled and divided the lower courts ...." *Id*. at 325 (citing *Nichols*, 511 U.S. at 745-46).

Nonetheless, the Seventh and Ninth Circuits have applied *Marks* to determine that the "narrowest grounds" from *Rapanos* means the CWA jurisdictional test that is least restrictive of the government's authority. These circuits have concluded that Justice Kennedy's "significant nexus" test governs because it provides the Corps and EPA with the broadest regulatory purview. See *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) ("This test is narrower (so far as reigning in federal authority is concerned) than the plurality's in most cases ..."); *No. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007) (Justice Kennedy's concurrence "is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases").

But why are the "narrowest grounds" equated with the least restrictions (and hence broadest assertion) on *government authority*? Especially under a statute such as the CWA—which can result in civil and criminal sanctions, and imprisonment if violated—shouldn't the "narrowest grounds" mean the least restrictions on otherwise *lawful private conduct*? Indeed, the First Circuit criticized *Gerke* as "[c]urious" and "without explanation," and decided it is "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality), because that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause."

United States v. Johnson, 467 F.3d 56, 61, 63 (1st Cir. 2006).[3]

Moreover, the Eleventh Circuit has somewhat followed the Seventh and Ninth Circuits, by deciding that *Rapanos*'s "narrowest grounds" means the least curtailment of federal authority. But that court makes matters even more confusing, because it would vary the governing CWA jurisdictional test from case to case. In *United States v. Robison,* 505 F.3d 1208 (11th Cir. 2007), the Eleventh Circuit wrote that "in factual circumstances different from *Rapanos,* Justice Scalia's test may be less restrictive of CWA jurisdiction," and that "[t]his case is arguably one in which Justice Scalia's test may actually be more likely to result in CWA jurisdiction than Justice Kennedy's test, despite the fact that Justice Kennedy's test, as applied in *Rapanos,* would treat more waters as within the scope of the CWA." *Id.* at 1122-23. One can imagine the confusion that will arise within the Eleventh Circuit where the district courts must decide if they are dealing with facts like *Rapanos* (where Justice Kennedy's approach will control), or unlike *Rapanos* (where the plurality approach will control). When is a CWA jurisdictional case like, or unlike, *Rapanos*?

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[3] In *Johnson,* Judge Torruella wrote separately to stress his belief that the Justice Scalia's *Rapanos* plurality provided the lone controlling analysis, because the "significant nexus" test raises serious constitutional concerns:

> I cannot concur that Justice Kennedy's seemingly opaque 'significant nexus' test is a constitutional measure of federal regulatory jurisdiction .... [The plurality's test] strikes a constitutional balance between federal and state regulatory interests, and our nation's interest in clean water and the individual land owner's right to manage their *[sic]* property in accordance with their dreams and aspirations, whether economic or otherwise.

467 F.3d at 66-67 (Torruella, J., concurring in part, dissenting in part).

The folly in deeming "significant nexus" a broader assertion of federal jurisdiction compared to the plurality's approach is evident in cases decided since *Rapanos*. For example, on another occasion the Ninth Circuit decided that the CWA did not cover a pond because "Justice Kennedy's controlling concurrence explained that *only wetlands* with a significant nexus to a navigable-in-fact waterway are covered by the Act." *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) (emphasis added). The Ninth Circuit said: "[W]e emphasize that [the significant nexus] standard was for wetlands ...." *Id.* at 708. Thus, *Baykeeper* interprets significant nexus to *not* reach ponds, pools, creeks, or other non-wetland features.[4] In contrast, the *Rapanos* plurality could consider such features as statutory "navigable waters" if they constitute "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features ....' " *Rapanos,* 547 U.S. at 739 (Scalia, J.). Accordingly, the plurality might deem a feature like Walden Pond as within the CWA, while the "significant nexus" test would not stretch so far—because Walden Pond is *not* a wetland. From this perspective, the significant nexus test is *more* restrictive of Corps jurisdiction; more types of features *escape* CWA coverage under Justice Kennedy's approach compared to the breadth of Justice Scalia's analysis, which reaches non-wetlands. Hence, following *Baykeeper,* the *Rapanos* plurality might be considered "the narrowest grounds" of concurrence.

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[4] *Baykeeper* correctly placed bounds around "significant nexus" as only allowing coverage *vis-à-vis* wetlands, considering that the primary basis for Justice Kennedy's theory was *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). See, *e.g.*, *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring) (relying on *Riverside Bayview*, and stating: "As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone").

Precisely because of the arbitrariness in discerning which test places greater limits on federal authority, the First Circuit rejected the course of the Seventh, Ninth, and Eleventh Circuits. In *Johnson,* 467 F.3d 56 (1st Cir. 2006), the First Circuit acknowledged "the shortcomings of the *Marks* formulation in applying *Rapanos.*" 467 F.3d at 64. *Johnson* thus ruled that "[t]he federal government can establish jurisdiction over the target sites if it can meet *either the plurality's or Justice Kennedy's standard* as laid out in *Rapanos.*" *Id.* at 66 (emphasis added). In fact, Justice Stevens suggested this same approach in his *Rapanos* dissent, 547 U.S. at 810 n.14 ("[I]n these and future cases the United States may elect to prove jurisdiction under either test").[5]

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[5] Other lower courts have adopted *Johnson*'s either/or approach. See *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun*

It is no wonder that the lower courts have rapidly devolved into conflict on the scope of CWA coverage. Does *Marks* even apply to lend interpretive assistance to *Rapanos*? If so, how does it apply and what are the "narrowest grounds" of concurrence among the Justices? Does "significant nexus" control? Does "relatively permanent waterbody" control? Can either test be used? Is there some other test? Since *Rapanos* was decided in 2006, the underlying petition in the case at bench is the eighth request seeking this Court's guidance on how property owners and regulators should determine if an aquatic feature is subject to federal CWA control.[6] The conflict is mature, the confusion is resolute, and things will get worse, unless this Court rapidly intervenes to lay some ground rules for interpreting *Rapanos*. Respectfully, the petition should be granted.

Club, 472 F. Supp. 2d 219, 226-27 (D. Conn. 2007), appeal docketed, No. 07-0795CV (2d Cir. Mar. 2, 2007); *United States v. Cundiff*, 480 F.Supp. 2d 940, 944 (W.D. Ky. 2007); *United States v. Bailey*, 516 F.Supp.2d 998, 1006 (D. Minn. 2007).

[6] The Court has denied certiorari in *Gerke Excavating, Inc.*, 464 F.3d 723, *cert. denied*, 128 S. Ct. 45 (2007); *Johnson*, 467 F.3d 56, *cert. denied*, 128 S. Ct. 375 (2007); *City of Healdsburg*, 496 F.3d 999, *cert. denied*, 128 S. Ct. 1225 (2008); *United States v. Heinrich*, 184 Fed. Appx. 542 (7th Cir. 2006), *cert. denied*, 127 S.Ct. 2974 (2007); *United States v. Morrison*, 178 Fed. Appx. 481 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 270 (2007); *Baccarat Fremont Developers, LLC v. U.S. Army Corps of Eng'rs*, 425 F.3d 1150 (9th Cir. 2005), *cert. denied*, 127 S.Ct. 1258 (2007); and *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), *cert. denied*, 544 U.S. ----. 2008 WL 743960 (June 23, 2008).

B. Specific Areas of Consensus Among the *Rapanos* Justices *are* Discernable—and Should be Announced by a Majority of This Court.

As the First Circuit stated, "one might sensibly conclude ... that the 'narrowest grounds' are simply understood as the 'less far-reaching common ground.' " *Johnson,* 467 F.3d at 63 (citations omitted). Again, to detect a court holding among five Justices, the *Marks* formulation requires an examination of those differing opinions that "concurred in the judgments." *Marks,* 430 U.S. at 193. Any holding from *Rapanos* must therefore be limited to an examination of Justice Scalia's plurality and Justice Kennedy's concurrence—because only those opinions garnered support from five Members who concurred in the judgment by vacating the Sixth Circuit's too-expansive interpretation of the CWA.[7] Justice Stevens's dissent does not factor into this calculus because it did not vacate the Sixth Circuit.[8] With the approaches taken by Justices Scalia and Kennedy thus placed in proper focus, there are important points of consensus that this Court should firmly announce to aid regulators and property owners in answering questions of CWA jurisdiction. Illustrative areas of agreement between the plurality and concurrence are as follows:

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[7] See *Rapanos,* 547 U.S. at 757 (plurality) ("We vacate the judgments of the Sixth Circuit in both No. 04-1034 *[Rapanos]* and No. 04-1384 *[Carabell]*, and remand both cases for further proceedings"); *id.* at 787 (Kennedy, J. concurring) ("In these consolidated cases I would vacate the judgments of the Court of Appeals ....")

[8] *Rapanos,* 547 U.S. at 810 (Stevens, J., dissenting) ("I would affirm the judgments in both cases ....").

- **The CWA's scope is not restricted to traditional navigable waters.**
  - Plurality: "[T]he Act's term 'navigable waters' includes something more than traditional navigable waters ...." *Rapanos,* 547 U.S. at 731. The plurality "affirmatively reject[ed]" an interpretation that the CWA "include[s] only navigable-in-fact waters." *Id.* at 751.
  - Concurrence: "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters" that are not in fact navigable." *Id.* at 779.

- **The word "navigable," in the phrase "navigable waters," has meaning.**
  - Plurality: "[T]he traditional term 'navigable waters' ... carries *some* of its original substance ...." *Id.* at 734.
  - Concurrence: "[T]he dissent reads a central requirement out [of the CWA]—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance." *Id.* at 778. "Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779.

- **A mere hydrological connection can *__not__* provide the basis for CWA jurisdiction.**
    - ➢ Plurality: Rejecting the federal government's hydrologic connection theory in deciding that the phrase " 'the waters of the United States' . . . cannot bear the expansive meaning that the Corps would give it." *Id.* at 731-732. "[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." *Id.* at 736 n.7.
    - ➢ Concurrence: Criticizing the dissent because it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778. "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 784-785.

- **Hypothetical, speculative, or eventual water flows do *__not__* support CWA jurisdiction.**
    - ➢ Plurality: "[T]he phrase 'the waters of the United States' includes *only* those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes." *Id.* at 739 (emphasis added). *"[O]nly* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands,

are 'adjacent to' such waters and covered by the Act." *Id.* at 742.

- Concurrence: "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, *however remote and insubstantial*—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case." *Id.* at 780 (emphasis added). "When ... wetlands' effects on water quality *are speculative or insubstantial,* they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 780 (emphasis added). In remanding *Carabell* back to the Sixth Circuit, Justice Kennedy stated that "[t]he conditional language in [the Corps's] assessments—'potential ability,' 'possible flooding'—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps' claims ...." *Id.* at 786. In *Carabell*, "the Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge .... *[M]ere adjacency* to a tributary of this sort *is insufficient;* a similar ditch could just as well be located many miles away from any navigable-in-fact water and *carry only insubstantial flow* towards it." *Id.* at 786 (emphasis added).

- **Mere presence of an ordinary high water mark does not render a feature a jurisdictional "tributary," or the wetlands next to such a feature jurisdictional "adjacent wetlands."**

- ➢ Plurality: As set out above, "'the waters of the United States' includes *only* those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features'…." *Id.* at 739 (emphasis added). And, as to wetlands, *only* those with a "continuous surface connection to bodies that are 'waters of the United States' in their own right …." *Id.* at 742 (original emphasis).
- ➢ Concurrence: "[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an *ordinary high-water mark …. This standard* presumably provides a rough measure of the volume and regularity of flow. … *[T]he breadth of this standard*—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—*precludes its adoption as the determinative measure* of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered *by this standard* might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 781-782 (emphasis added).

- **CWA jurisdiction is not lost simply because a waterbody is regularly wet during certain seasons and dry during others.**

  - ➢ Plurality: Recognizing that the Los Angeles River would be jurisdictional under the CWA, and stating: "We ... do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day continuously flowing stream postulated by Justice STEVENS' dissent ...." *Id.* at 733 n.5. "[N]o one contends that federal jurisdiction appears and evaporates along with water in such regularly dry channels." *Id.* at 733 n.6.
  - ➢ Concurrence: "The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river ... Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete ... over a length of some 50 miles ... Though this particular waterway *might satisfy the plurality's test,* it is illustrative of what often-dry watercourses can become when rain waters flow." *Id.* at 769-770 (emphasis added).

- **As a general matter "navigable waters" and "point sources" are *not* the same thing, and normally a feature can't be both.**
  - ➢ Plurality: The CWA's definitions "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." *Id.* at 735.
  - ➢ Concurrence: "[E]ven were the statute read [as the plurality does] to require continuity of flow for navigable waters, certain waterbodies *could*

conceivably constitute both a point source and a water." *Id.* at 772 (emphasis added).

Amicus does not offer these points as an exhaustive list of all areas in which Justices Scalia and Kennedy agree. But these examples of consensus are important and, if articulated cohesively by a majority of Justices in a single opinion, would go a long way toward yielding proper and predictable CWA implementation in the field.

II. GUIDANCE FROM THIS COURT IS NECESSARY TO CLARIFY THE MEANING OF "TRADITIONAL NAVIGABLE WATERS."

After years of analyzing the CWA and advising their members on how to comply with it, *amici* believe that the genesis for many problems with the Act's implementation derive from the confusingly similar nature of the terms used to define its jurisdictional scope. Regulators, lawyers, and (with due respect) courts use different phrases pertaining to "navigable" features interchangeably and imprecisely. The Court should view the petition as an opportunity to provide all stakeholders with a shared understanding of basic CWA terminology.

The CWA covers "navigable waters," which are defined to mean the "waters of the United States." 33 U.S.C. §§ 1362(7), (12). Corps authority under Section 10 of the Rivers and Harbors Act of 1899 ("RHA"), 33 U.S.C. § 403, extends to the "navigable waters of the United States." 33 U.S.C. § 403. As noted above, both Justices Scalia and Kennedy agreed that the CWA's scope encompasses more than RHA waters, or the traditionally navigable waters ("TNWs"). *Supra* p. 12. Yet, the determination of a feature as a TNW is the crucial, foundational component of each of their CWA analyses. Justice Scalia wrote that one "finding" necessary to determine if a wetland is covered by the CWA is if the "adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to *traditional interstate navigable waters*) ...." *Id.* at 742 (emphasis added). Justice Kennedy stated that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and *navigable waters in the traditional sense*." *Id.* at 779 (emphasis added) (Kennedy, J., concurring). *Amici* submit that great clarity would be lent to CWA jurisdictional issues if this Court defines the factors that comprise navigable waters in the "traditional sense."

Indeed, the district court's jury instruction confused a TNW with a "navigable-in-fact" waterbody, as follows:

> Wetlands are adjacent to a navigable body of water if there is a significant nexus between the wetlands in question and a *navigable-in-fact* waterway.

United States v. Lucas, 516 F.3d 316, 323-24 (5th Cir. 2008) (emphasis added). In *Rapanos*, however, Justice Kennedy, provided that wetlands must have a significant nexus to a *TNW*, not a "navigable-in-fact" waterbody. *Supra* p. 18. As discussed below, just because a waterbody is "navigable-in-fact" does not necessarily mean it is a TNW.

A. The *Rapanos* Plurality and Concurrence Relied on *The Daniel Ball* and *Appalachian Electric* in Discussing TNWs.

In portraying waters that are navigable in the traditional sense, Justice Kennedy cited *The Daniel Ball*, 77 U.S. 557 (1870), and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). He explained that the "traditional understanding of the term 'navigable waters of the United States'" is those "waters susceptible to use in *interstate* commerce." *Id.* at 760 (emphasis added). Thus, when Justice Kennedy refers to "navigable waters in the traditional sense" (TNWs), he is ostensibly referring to the "navigable waters of the United States." *Id.* at 779, 760.

Similarly, the *Rapanos* plurality relied on *The Daniel Ball* and *Appalachian Electric,* in explaining traditional federal control over water features:

> For a *century prior* to the CWA, we had interpreted the phrase "navigable waters of the United States" in the Act's predecessor statutes to refer to interstate waters that are "navigable in fact" or readily susceptible of being rendered so. *The Daniel Ball,* 10 Wall. 557, 563, 19 L.Ed. 999 (1871); see also *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 ... (1940).

Rapanos, 546 U.S. at 723 (emphasis added).

B. A Waterbody is a TNW if it Satisfies Three Criteria.

In *The Daniel Ball*, 77 U.S. 557 (1870), the Supreme Court interpreted the term "navigable waters of the United States." The case involved a steam vessel that was allegedly operating in violation of a federal law prohibiting unlicensed vessels from transporting merchandise or people upon the "'bays, lakes, rivers, or other *navigable waters of the United States*.'" *Id.* at 557 (emphasis added). Resolving the dispute, the Court first determined whether such transport was being conducted on a navigable water of the United States. According to Justice Field, the answer was found in the river's navigable capacity:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as *highways for commerce, over which trade and travel are or may be conducted* in the *customary modes of trade and travel on water*. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting other waters, a *continued highway over which commerce is or may be carried on with other States or foreign countries* in the customary modes in which such commerce is conducted by water.

Id. at. 564 (emphasis added). Thus, under *The Daniel Ball*, TNWs must contain a navigation element, a commerce element, *and* an interstate element.[9] Waters are TNWs if they are: (1) "navigable in fact" (*i.e.*, support boat traffic); *and* (2) constitute a highway of commerce for trade or travel; *and* (3) form in their ordinary condition, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries.[10]

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[9] *See also Escanaba Co. v. Chicago*, 107 U.S. 678, 682 (1883) ("[t]he power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in-fact so far as it may be necessary to ensure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the states or with foreign countries"); *The Montello*, 87 U.S. 430, 442 (1874) (explaining it is *not* "'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable'" (quoting Chief Justice Shaw in *Rowe v. Granite Bridge Corp.*, 38 Mass (21 Pick.) 344 (1838))); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899) (finding the Rio Grande was *not* navigable in the Territory of New Mexico and that "[t]he mere fact that logs, poles, and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river"); *Leovy v. United States*, 177 U.S. 621, 633 (1900) (explaining that the jury was incorrectly informed that "the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, ... is sufficient to constitute a navigable water of the United States").

[10] In Appendix D of the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/jd_guidebook_051207final.pdf* (2007) (hereinafter *Guidebook*), the Corps and EPA relied on *United States v. Holt State Bank*, 270 U.S. 49

Subsequently, in *Appalachian Electric*, the Court, building on the standard set forth in *The Daniel Ball*, declared "[a] waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken." *Appalachian Electric*, 311 U.S. at 407. Thus, through "reasonable improvements" it is possible to make "an interstate waterway available for traffic," thus bringing it within the power of Congress. *Id.* at 408. The Court acknowledged, however, that "reasonable improvements" must be tempered by economic practicality: "[t]here must be a balance between costs and need at a time when the improvement would be useful." *Id.* at 407-408. Thus, in *Appalachian Electric*, the Court established the principle that if a waterbody requires "reasonable improvements" to satisfy *The Daniel Ball* test, it will still be considered a navigable water of the United States.

(1926) *United States v. Utah,* 283 U.S. 64 (1931) and *Utah v. United States,* 403 U.S. 9 (1971), to determine which waterbodies are "traditional navigable waters." *Guidebook*, app. D (2007) (Appendix D is titled *Legal Definition of "Traditional Navigable Waters"*). The relevant inquiry for purposes of CWA jurisdiction, however, must be whether Congress had authority over the water in question pursuant to the Commerce Clause. This was *not* the issue in *Holt State Bank* or the *Utah* cases. In those cases, the controversy focused on whether the respective water features were navigable for purposes of deciding if their beds fell within state or federal ownership under the "equal footing" doctrine—wholly irrelevant to questions of CWA jurisdiction in light of how Justices Scalia and Kennedy perceived TNWs in *Rapanos*.

Consequently, reading *The Daniel Ball* and *Appalachian Electric* together, waterbodies that have traditionally been within the federal government's authority—the "navigable waters of the United States"—are those waterbodies that:

- Support the customary modes of travel on the water (*i.e.*, boat traffic);
- Are, were, or with reasonable improvements could be used as commercial highways that transport goods; *and*
- Form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries.

Thus, whether a waterbody supports boat traffic—a component of making it navigable-in-fact—does not end the TNW inquiry. Such a feature may not qualify as a TNW *unless* it also serves as part of a highway of commerce that is interstate. In other words, a "navigable-in-fact" waterbody is not a TNW if it does not also form in its ordinary condition, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries. The Court should grant certiorari to clarify the important distinction between TNWs, navigable-in-fact waters, and waters subject to Corps authority under the CWA.

III. THIS COURT SHOULD APPLY THE RULE OF LENITY TO RESOLVE AMBIGUITIES ON THE MEANING OF STATUTORY "NAVIGABLE WATERS."

In the CWA, Congress defined "navigable waters" as "the waters of the United States." 33 U.S.C. §1362(7). It failed, however, to provide a definition of "waters of the United States." As the Court has recognized, the legislative history of the CWA clarifies that it reaches more than TNWs. *Supra* p. 12. The extent of the reach, however, is far from apparent. As shown in Parts I and II, there no clear understanding of when wetlands and nonnavigable waters are or are not "water of the United States." The agencies have failed to develop a new regulation that clearly defines the term even after five of the Justices suggested that such a regulation is necessary. *Rapanos*, 547 U.S. at 726, 757-58, 811-12 (Scalia, J., plurality opinion; Roberts, C.J., concurring opinion; Breyer, J., dissenting opinion). Furthermore, the courts cannot even agree on the proper test for determining if a geographic feature is a "water of the United States." *Supra*, pp. 4-10. Yet, three people are in jail for *knowingly* discharging pollutants from a point source into waters of the United States without a permit. 33 U.S.C. §§ 1311, 1319(c).

Because the definition of "navigable waters" as "waters of the United States" is imprecise and because the agencies' regulations have done little to clarify the meaning, the court below should have construed any ambiguity in favor of the defendants.

As this Court recently explained: "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008) (plurality opinion). Two policies serve as the basis for the rule of lenity. First, it serves to protect a person's right to fair warning: "Application of the rule of lenity ensures that criminal statutes will provide *fair warning* concerning conduct rendered illegal ...." *Liparota v. United States*, 471 U.S. 419, 427 (1985), *Santos*, 128 S. Ct. at 2025 ("[N]o citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed"). Second, because of the "seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971) (internal citations omitted); *Santos*, 128 S. Ct. at 2025 (explaining that application of the rule "places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead").

Even after examining the language of the CWA, its structure, and legislative history, uncertainty remains over whether Congress intended to extend the scope of the CWA to the wetlands on the Petitioner's property. This is illustrated by the District Court's desire to have "some clue as to what might be factors that could be considered in determining whether there is a significant nexus between the wetland and navigable body of water, in fact." Pet. at 10.

Principles of fairness require this Court's review to ensure that any ambiguities concerning whether the wetlands at issue are within the scope of the CWA be resolved in Petitioners' favor.

CONCLUSION

For all of the foregoing reasons, the petition should be granted.

July 7, 2008

Respectfully submitted,

DUANE J. DESIDERIO
THOMAS J. WARD*
JEFFREY B. AUGELLO
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, NW
Washington, D.C. 20005
(202) 266-8200
**Counsel of Record*

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER,
LITIGATION CENTER, INC.
1615 H STREET, N.W
WASHINGTON, D.C. 20062
(202) 463-5337

APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987); *Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Franconia Assocs. v. United States,* 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005); *Kelo v. City of New London,* 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 547

U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *John R. Sand and Gravel Co. v. United States,* 128 S.Ct. 750 (2008); and *Summers v. Earth Island Inst.,* No. 07-463, *cert. granted,* 128 S.Ct. 1118 (2008).

98

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No. 07-1512

In the
Supreme Court of the United States

◆

ROBERT J. LUCAS, JR., *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

◆

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

◆

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTIONS PRESENTED

1. In applying *Rapanos v. United States*, 547 U.S. 715 (2006), to determine federal jurisdiction over wetlands under the Clean Water Act, are federal courts bound to apply the analysis of the plurality decision, the concurrence, or some other standard?

2. Under whichever approach the Court chooses, did the Fifth Circuit err in holding that federal jurisdiction under the Act extends to a wetland that merely "neighbors" a "tributary" of a navigable water, without requiring that the wetland have a *continuous* surface connection with a relatively permanent body of water, or that it *significantly* affect the quality of traditional navigable waters?

3. Is an ordinary residential septic tank a "point source" under the Act and, if so, can one who designs or certifies the system but neither owns nor operates it be held criminally liable for its discharges?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE WRIT 5

I. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT THE STANDARD TO APPLY IN DETERMINING JURISDICTIONAL WETLANDS UNDER THE CLEAN WATER ACT 5

II. THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER *MARKS* APPLIES TO THIS COURT'S SPLIT DECISIONS SUCH AS *RAPANOS* 11

III. IN ADDITION TO THE CIRCUIT CONFLICTS, FAIRNESS AND JUSTICE WARRANT A REVIEW OF THIS CASE 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810 (9th Cir. 2001). 16

Furman v. Georgia, 408 U.S. 238 (1972) 6

Gregg v. Georgia, 428 U.S. 153 (1976) 5-6

In re Michael Francis Cook, 322 B.R. 336 (2005) 6

Johnson v. Board of Regents of the University of Georgia, 263 F.3d 1234 (11th Cir. 2001) 8

King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) 8, 13

Marks v. United States, 430 U.S. 188 (1977) . . . . *passim*

Memoirs v. Attorney General of Massachusetts, 383 U.S. 413 (1966) 8

Nichols v. United States, 511 U.S. 738 (1994) 14

Northern California River Watch v. City of Healdsburg, 457 F.3d 1023 (9th Cir. 2006) 4

Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007) 1, 10-11

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987) 13

TABLE OF AUTHORITIES—Continued

Page

Planned Parenthood v. Casey,
947 F.2d 682 (3d Cir. 1991) 12

Rapanos v. United States,
547 U.S. 715 (2006) . . . . *passim*

Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Labs, 842 F.2d 1436
(3d Cir. 1988) 13

Tyler v. Bethlehem Steel Corp.,
958 F.2d 1176 (2d Cir. 1992) 12

United States v. Chevron Pipe Line Company, 437 F. Supp. 2d 605
(N.D. Tex. 2006) 17

United States v. Gerke Excavating, Inc.,
412 F.3d 804 (7th Cir. 2005) 4

United States v. Gerke Excavating, Inc.,
464 F.3d 723 (7th Cir. 2006) . . . . *passim*

United States v. Gradwell,
243 U.S. 476 (1917) 17

United States v. Johnson, 467 F.3d 56
(1st Cir. 2006) . . . . passim

United States v. Lanier,
520 U.S. 259 (1997) 17

United States v. Lucas, 516 F.3d 316
(5th Cir. 2008) 1, 4, 11

Page

United States v. Mills,
817 F. Supp. 1546 (N.D. Fla. 1993) 16

United States v. Robison,
505 F.3d 1208 (11th Cir. 2007) 4, 11, 14

United States v. Williams, 435 F.3d 1148
(9th Cir. 2006) 12

Federal Regulation

33 C.F.R. § 328.3(b) 15

Miscellaneous

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government and seeks to balance environmental goals with individual rights and other social values.

PLF attorneys represented John Rapanos in *Rapanos v. United States*, 547 U.S. 715 (2006), on which this case turns and has participated in virtually every circuit court case interpreting that decision. PLF represented the landowners in *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006) (cert. denied), and *United States v. Johnson,* 467 F.3d 56 (1st Cir. 2006) (cert. denied), and was amicus in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007) (cert. denied), and *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), below.

---

[1] In accordance with Rule 37, Counsel of Record for all parties received notice at least ten days prior to the due date of the Amicus Curiae's intention to file this brief. The parties have provided written consent to the filing of this brief which has been lodged with the Clerk of this Court.

Amicus Curiae affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

On two occasions, PLF petitioned this Court to address a conflict among the circuits as to the application of *Rapanos* in determining federal jurisdiction under the Clean Water Act. Those cases (*Gerke* and *Johnson*) involved remand orders authorizing federal regulation of wetlands using contradictory legal standards. Certiorari was denied in both cases. This Court now is presented with a final decision from the Fifth Circuit which enlarges the conflict among the circuits and imposes long-term prison sentences on Petitioners. PLF submits this brief to urge this Court to resolve this conflict.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is a travesty of justice to imprison common citizens for ordinary conduct without either criminal knowledge or criminal intent. In this case, Petitioners Mr. Robert J. Lucas, Mrs. Robbie Lucas Wrigley, and Mr. M. E. Thompson have been sentenced to seven to nine years in federal prison (where they now are serving) and each fined millions of dollars for filling wetlands and installing professionally engineered residential septic systems without federal permits, even though the wetlands fail to satisfy any predictable standard for federal jurisdiction and the government has never required a federal permit for the installation of a residential septic system.

The subject wetlands were deemed jurisdictional because they "neighbor" nonnavigable intermittent "tributaries" (*i.e.*, swales and drainage ditches) that are alleged to connect to actual navigable waters miles away. The terms "neighboring" and "tributaries" are undefined and indeterminate so that even expert practitioners and government officials cannot agree on their application. In over 35 years of enforcement of the Clean Water Act, the Environmental Protection Agency and the Corps of Engineers have never adopted a consistent standard for determining jurisdictional wetlands. Nor has the agency ever required a discharge permit for the millions of residential septic systems used nationwide. Those standards that are applied are subjective, inconsistent, and unpredictable. In a word: arbitrary. No reasonable person would or should have expected federal control to reach as far as the agencies now claim.

There is a growing trend among federal agencies and the courts to expand the enforcement power of the government incrementally by adopting regulatory interpretations that go beyond their plain meaning and intent. This case is a singular example of government overreaching. Under Fifth Circuit jurisprudence, innocent conduct becomes criminal. This is contrary to Supreme Court precedent and an assault on common sense. In the interests of fairness and justice, this Court should grant review and reverse the decision below.

Review by this Court also is warranted to resolve multiple conflicts among the lower courts as to how to interpret this Court's *Rapanos* decision and to identify the proper legal standard for determining Clean Water Act jurisdiction.

In *Rapanos*, a five Justice majority of this Court held that federal jurisdiction did not extend to wetlands under the Clean Water Act based solely on a hydrological connection between those wetlands and a navigable-in-fact waterway downstream. But this Court split on the test for establishing such jurisdiction. A four Justice plurality interpreted the

Clean Water Act narrowly to cover traditional rivers, lakes, and streams connected to navigable-in-fact waters, and those wetlands "indistinguishable" from these waters. But Justice Kennedy, who concurred in the judgment, interpreted the Act broadly so as to reach any wetland with a "significant nexus" to navigable-in-fact waters.

The Circuit Courts of Appeals are split on how to apply this Court's *Rapanos* decision. In *United States v. Gerke Excavating, Inc.*, 412 F.3d 804 (7th Cir. 2005) (cert. denied), the Seventh Circuit held that Justice Kennedy's "significant nexus" test was controlling. The Ninth Circuit came to the same conclusion in *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006) (cert. denied). But, the First Circuit expressly rejected this reading of *Rapanos* and held that Clean Water Act jurisdiction could be extended to inland wetlands based on *either* the plurality test *or* Justice Kennedy's "significant nexus" test. *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006) (cert. denied). The Eleventh Circuit in *United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007), then rejected the First Circuit "either/or" test and followed the Seventh and Ninth Circuits. The Fifth Circuit in this case added to the confusion by failing to adopt any controlling opinion in *Rapanos*, but expressly holding that "the Government has jurisdiction over waters that neighbor tributaries of navigable waters." *United States v. Lucas*, 516 F.3d at 326.

These circuit rulings conflict with this Court's analysis in *Marks v. United States*, 430 U.S. 188, 193 (1977), wherein this Court declared that in fragmented decisions "the holding of the Court may be viewed as that position taken by those Members *who concurred* *in the judgments on the narrowest grounds.*" (Citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (emphasis added).) Under a literal reading of *Marks*, the "narrowest grounds" in *Rapanos* is the plurality position because it is a logical subset of the Kennedy test. But not all courts follow a literal reading of *Marks*. Indeed, there is general disagreement among the circuits as to whether and how *Marks* applies to this Court's split decisions.

Review by this Court is necessary not only to resolve a clear and substantial conflict among the Circuit Courts as to enforcement of the Clean Water Act under *Rapanos*, but also to clarify this Court's interpretive rules for split opinions.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT THE STANDARD TO APPLY IN DETERMINING JURISDICTIONAL WETLANDS UNDER THE CLEAN WATER ACT

In *Marks*, this Court was clear: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds*.'" 430 U.S. at 193 (citing *Gregg*, 428 U.S. at 169 n.15) (emphasis added). Although this interpretive rule has been difficult in application, it has been recognized as the *only* approach sanctioned by this Court for interpreting its split decisions. *In re Michael Francis Cook*, 322 B.R. 336, 341 (2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

The language of *Marks* was not unique to that case. It derived from this Court's decision in *Gregg v. Georgia*, 428 U.S. 153. In *Gregg*, this Court examined *Furman v. Georgia*, 408 U.S. 238 (1972), which involved a challenge to the constitutionality of a Georgia death penalty statute. In *Furman*, as in *Rapanos*, five Justices agreed in the judgments, but the Court was split on the legal standard that should be applied to death penalty cases. Two Justices who concurred in the judgments felt that capital punishment was unconstitutional in all cases whereas the other three Justices believed that capital punishment was unconstitutional only in the circumstances presented in that case. Thus in *Gregg*, this Court held: "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." 428 U.S. at 169 n.15.

In *Gerke*, 464 F.3d 723, which also involved a jurisdictional challenge to federal regulation of inland wetlands, the Seventh Circuit putatively relied on *Marks* to interpret *Rapanos*, but it changed the wording of the *Marks* rule, and therefore the test. In *Gerke*, the court cited *Marks* for the proposition that

> [w]hen a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have

> assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground.

Id. at 724 (citations omitted).

This adulterated version of the *Marks* rule allowed the Seventh Circuit to aggregate the four dissenters in *Rapanos* with Justice Kennedy to find five Justices that would support Justice Kennedy's "significant nexus" standard for establishing federal jurisdiction over wetlands under the Clean Water Act. However, the court ignored the more persuasive argument that when the plurality standard is applied to find federal jurisdiction, it would have the support of all nine Justices. But under *Marks*, finding the support of five Justices is not the test, especially in a case like *Rapanos* where five or more Justices would support more than one opinion. Rather, under *Marks*, lower-court judges are to look at the "narrowest grounds."

The First Circuit in *Johnson* found it curious that *Gerke* equated "narrowest grounds" with the opinion "least restrictive of federal authority." 467 F.3d at 61. Although the cases on which *Marks* relied involved situations in which the "narrowest grounds" was the least restrictive of federal jurisdiction, the First Circuit observed that this was mere coincidence and that it "does not necessarily mean that the Supreme Court in *Marks* equated the 'narrowest grounds' . . . to the grounds least restrictive of the assertion of federal authority." *Id.* at 63. "Such an equation," the court stated, "leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party." *Id.* Given the constitutional issue raised, the court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)," because, the court concluded, "that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.*

In contrast to the Seventh Circuit's reading of *Marks* in *Gerke*, the First Circuit opined that the "narrowest grounds" might sensibly be interpreted to mean the "less far-reaching-common ground," citing *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1247 (11th Cir. 2001), or the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases," citing Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 420-21 (1992). *See also Johnson*, 467 F.3d at 63.

Relying on *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991), the First Circuit noted the D.C. Circuit found "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *Johnson*, 467 F.3d 63. "In other words," the First Circuit explained, "the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other." *Id.* According to the First Circuit, *Marks* followed this approach. In *Marks* this Court examined *Memoirs v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), in which a majority of this Court held that a lower court incorrectly concluded a book was obscene and did not have First Amendment protection. Three Justices decided that if materials are deemed obscene they should receive no First Amendment protection while two other Justices concluded that the First Amendment provided an absolute shield against government action. As a logical subset of the other, this Court concluded in *Marks* that the former opinion, excluding obscene materials from First Amendment protections, was the "narrowest grounds" for the judgment and the controlling opinion in the case.

Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-04 (1992).

In *Johnson*, the First Circuit noted that the Kennedy "significant nexus" standard in *Rapanos* is not a "logical subset" of the plurality standard for federal jurisdiction over wetlands: "The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." *Johnson*, 467 F.3d at 64. However, the First Circuit failed to consider the obvious possibility that the plurality standard is a "logical subset" of the Kennedy standard. This possibility was simply ignored. So broad is the Kennedy approach that the plurality found it barely distinguishable from the government's "any hydrological connection" test the majority struck down: "Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again." *Rapanos*, 547 U.S. at 757 n.15.

Thus, in *Rapanos*, the plurality's jurisdictional standard is comparable to the narrower strict scrutiny standard, whereas the Kennedy "significant nexus" standard is comparable to the broader rational basis standard. As Justice Stevens observed, it would be an "unlikely event that the plurality's test is met but Justice Kennedy's is not." *Id.* at 810 n.14.

In other words, the plurality opinion was decided on the "narrowest grounds," not because it is the most restrictive of federal authority, but because it is less sweeping and would require the same outcome in a subset of the cases as would the more sweeping Kennedy opinion. For this reason, the First Circuit rejected *Gerke*'s conclusion that under *Marks* Justice Kennedy's lone concurrence is controlling in *Rapanos*. Instead, the First Circuit held that "*Marks* does not translate easily to the present situation," *Johnson*, 467 F.3d at 64, and that the "federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *Id.* at 60.

In *Northern California River Watch v. Healdsburg*, 496 F.3d 993, the Ninth Circuit adopted the approach of the Seventh Circuit holding that Justice Kennedy's "significant nexus" standard is controlling in *Rapanos* under the *Marks* rule, thus creating an additional conflict among the Circuits. The Eleventh Circuit adopted this same approach in *United States v. Robison*, 505 F.3d at 1221, after expressly rejecting the First Circuit's "either/or" test put forward in *Johnson*. According to the Eleventh Circuit, "It would be inconsistent with *Marks* to allow the dissenting *Rapanos* Justices to carry the day and impose an 'either/or' test" because, under *Marks*, the opinion of the dissenting Justices "is of no moment." *Id.* Finally, the Fifth Circuit in this case applied the jurisdictional tests of the *Rapanos* plurality, the concurrence, *and* the dissent as if they were all of equal validity without so much as a mention of the *Marks* rule. Then it perversely held that "the government has jurisdiction over waters that neighbor tributaries of navigable waters." *United States v. Lucas*, 516 F.3d at 326. This "neighboring" test is not found in the *Rapanos* decision, thus the Fifth Circuit introduced a new jurisdictional standard and an additional conflict among the circuits.

This conflict creates a substantial disparity between these circuits in the enforcement of the Clean Water Act which requires reconciliation by this Court.

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER *MARKS* APPLIES TO THIS COURT'S SPLIT DECISIONS SUCH AS *RAPANOS*

As the First Circuit points out, a number of Circuits have abandoned this Court's *Marks* approach to split opinions or applied *Marks* selectively. Instead, they have sought to divine the controlling opinion in this Court's fragmented decisions, like *Rapanos*, by adopting a "pragmatic" approach to the situation. This approach involves assessing which grounds would "command a majority of the Court." *Johnson*, 467 F.3d at 64-65. In *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992), for example, the court concluded: "In essence, what we must do is find common ground shared by five or more justices." *See also United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) ("We need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.' ") (citing *Planned Parenthood v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991)).

The courts that have adopted this approach are not particular as to the Justices that may be joined in a "majority." In contrast to the directive in *Marks*, that the controlling opinion must be found among those Justices who concurred in the judgments, some Circuits give equal weight to the dissenting Justices. The Seventh Circuit in *Gerke*, which purported to apply *Marks*, relied on the fact that "any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters)." *Gerke*, 464 F.3d at 725. The First Circuit in this case used similar logic to justify its determination that federal jurisdiction over wetlands could be established under either the plurality test in *Rapanos* or the Kennedy test:

> If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction.

Johnson, 467 F.3d at 64.

In *Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Labs*, 842 F.2d 1436 (3d Cir. 1988), the Third Circuit examined *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), to determine the controlling opinion. In *Pennsylvania*, this Court was asked to address the availability of contingency fees under federal fee-shifting statutes. This Court split along the lines of *Rapanos* with four Justices in the plurality, four Justices in the dissent, and Justice O'Connor's lone concurrence in the judgment. The Third Circuit determined that "[b]ecause the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court" and is controlling. *Student*, 842 F.2d at 1451.

In *King v. Palmer*, 950 F.2d 771, the D.C. Circuit took a different approach. According to *Johnson*, the D.C. Circuit "refused to examine the points of commonality among Justice O'Connor's opinion and that of the dissent, relying mainly on a literal reading of *Marks's* [sic] language that the holding is the position of the Justices '*who concurred in the judgments* on the narrowest grounds.' " *Johnson*, 467 F.3d at 65 (citing *Marks*, 430 U.S. at 93). The D.C. Circuit relied as well on the fact that this Court "had not explicitly applied *Marks* to situations where concurring and dissenting votes would be combined." *Id.*

More recently, although the Eleventh Circuit in *Robison* agreed with the Seventh Circuit in *Gerke*, that the Kennedy opinion in *Rapanos* was controlling under *Marks*, the Eleventh Circuit parted ways with *Gerke* in concluding that the *Rapanos* dissent was "of no moment." *Robison*, 505 F.3d at 1221.

This widespread circuit conflict has not gone unnoticed by this Court. This Court has remarked on how the *Marks*' inquiry has "so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 746 (1994). It is time, therefore, for this Court to address this conflict in the context of this case.

III

IN ADDITION TO THE CIRCUIT CONFLICTS, FAIRNESS AND JUSTICE WARRANT A REVIEW OF THIS CASE

For the first time, in this case, a residential septic system (like the millions used throughout the country) has been declared a "point source" under the Clean Water Act subject to NPDES permitting. Thus, without notice or precedent Petitioners have been fined millions of dollars and sentenced to federal prison for nearly a decade for a criminal act they could not have intended or even foreseen. This is a travesty of justice which, standing alone, warrants review by this Court. But there is more.

Since the promulgation of the Clean Water Act, the Corps of Engineers and the Environmental Protection Agency have failed to follow a consistent jurisdictional test for regulated wetlands. A report from the General Accounting Office confirmed that the Army Corps of Engineers' local districts "differ in how they interpret and apply the federal regulations when determining which waters and wetlands are subject to the [Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004), *available at* http://www.gao.gov/new.items/d04297.pdf (last visited June 25, 2007) (GAO Report).

In addition to the interdistrict inconsistences, the GAO Report concluded that even Corps staff working in the same office cannot agree on the scope of the Clean Water Act and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Clean Water Act. GAO Report at 22. This is more than a theoretical concern. This degree of uncertainty permeates the enforcement decisions of the federal government. In this case, as in others, those decisions became the basis for multimillion dollar fines and criminal prosecution.

The right of the people to know when they have violated the law is deserving of greater safeguard than the convenience of the enforcing agency. But the scope of federal jurisdiction under the Clean Water Act is beyond the comprehension of ordinary people. The very definition of "wetlands" defies common sense. Federal regulations define "wetlands" as those areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). Under this definition, an area need be wet only "for one to two weeks per year" to qualify as a "wetland." Gordon M. Brown, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994). In other words, a "wetland" may be mostly dry land.[2]

No reasonable person would conclude that mostly dry land is subject to federal control as a jurisdictional wetland. Ocie Mills and his son found this out the hard way. These two men were convicted in the Eleventh Circuit for filling "wetlands" on their property without a permit—an act a district court characterized as the innocuous placing of clean fill on dry land:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corp of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable waters of the United States."

United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

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[2] The definition of "discharge" also defies common sense. The Corps interprets that term to mean the mere movement of dirt in situ. *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001).

For this offense, Mills and his son served 21 months in prison, one year in supervised release, paid $5,000 in fines, and were required to restore the site to its original condition. *Id.*

This Court has long held that "before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). *See also United States v. Lanier*, 520 U.S. 259, 267 (1997). But the jurisdictional test applied in this case provides no such clarity. To the contrary, it is perfectly opaque. When, exactly, does a wetland "neighbor" an undefined "tributary"?

Similar questions were raised by the district court in *United States v. Chevron Pipe Line Company*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006), the first case to apply the *Rapanos* decision. That case involved an accidental discharge of oil into a dry, unnamed drainage ditch that flowed only during significant storm events. *Id.* at 607. Although the oil was cleaned up before it reached any water, as required by state law, and the nearest navigable-in-fact waterway was connected to the ditch by intermittent streams scores of miles away, the Corps of Engineers sought fines from the company for discharging into "navigable waters" without a federal permit. *Id.* at 607-08. Therefore, the court looked to *Rapanos* for guidance in determining the scope of federal jurisdiction.

The court was quick to dismiss the Kennedy approach as an unworkable standard. The court observed that Justice Kennedy "advanced an ambiguous test—whether a 'significant nexus' exists to waters that are/were/might be navigable." *Id.* at 613. According to the court, "[t]his test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?" *Id.* (citations omitted). Therefore, instead of relying on the Kennedy opinion, the court based its decision on existing Fifth Circuit precedent and "the Supreme Court's plurality opinion in *Rapanos v. United States*" and concluded there was no federal jurisdiction. *Id.* at 615. That decision underscores the real world difficulties that are created for the enforcing agencies and the trial courts when this Court does not provide clear limits on federal authority.

The ambiguous standard imposed by the court in this case is sure to result in inconsistent and unpredictable applications of the law. Such a standard leaves the door open to continued federal overreach. Only this Court can strike the constitutional balance between federal power and individual rights. *See Johnson*, 467 F.3d at 66 (Torruella, C. J., dissenting).

CONCLUSION

There is a real and growing conflict among the circuits over federal wetland jurisdiction that must be resolved by this Court. There is also a real and growing conflict among the circuits over the applicability of the *Marks* rule in interpreting split decisions, like *Rapanos*, that must be resolved by this Court. These conflicts have now resulted in the criminal prosecution and imprisonment of ordinary citizens based on unsettled and contradictory jurisdictional standards under the Clean Water Act. Further inaction by this Court will result in continuing uncertainty as to the scope of the Act and undermine the Constitution's safeguards against arbitrary enforcement of the law. Therefore certiorari should be granted.

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Respectfully submitted,

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae
Pacific Legal Foundation